Supreme Court, U.S.
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No.

IN THE UNITED STATES SUPREME COURT

DOUGLAS B. MOYLAN,
Attorney General of Guam,
Petitioner,

vs.

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,
by and through its
Board of Directors,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the Territory of Guam

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QUESTION PRESENTED

Whether, in the absence of express authority from the United States Congress, the local Legislature for the Territory of Guam may alter, abridge, restrict or modify the powers and duties of the Attorney General of Guam, an Office established in the Organic Act of Guam by the United States Congress.

LIST OF PARTIES AND AFFILIATES

The Petitioner, Douglas B. Moylan, is the elected Attorney General of Guam, designated by the United States Congress as the "Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1).

The respondent is a public corporation and an autonomous instrumentality of the Government of Guam, called the A.B. Won Pat International Airport Authority, Guam. Title 12 Guam Code Annotated § 1102.

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OPINIONS BELOW

The Opinion of the Supreme Court of Guam holding that an Act of Congress that amends the Organic Act of Guam and bestows common law powers upon the Congressionally established Office of the Attorney General and "Chief Legal Officer of the Government of Guam," 48 U.S.C. § 1421g(d)(1), may nevertheless be "subject to increase, alteration or abridgement" by the Legislature of Guam is *A.B. Won Pat Guam International Airport Authority v. Douglas B. Moylan, Attorney General of Guam,* 2005 Guam 5, ¶ 2, available at 2005 WL 291577. It also appears in the appendix of the Petitioner (Pet. App.) at A-1. The Decision and Order of the Superior Court of Guam granting mandamus relief to respondent A.B. Won Pat Guam International Airport Authority, directing the Attorney General of Guam to approve a legal services contract between GIAA and a private law firm, is unpublished and appears at Pet. App. B-1.

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Guam on February 8, 2005. This Court has jurisdiction to grant this Petition pursuant to 28 U.S.C. § 1257(a) as applied to the Territory of Guam by 48 U.S.C. § 1424-2. Prior to October 30, 2004, a petition for writ of certiorari from a final judgment of the Supreme Court of Guam would have been filed in the Ninth Circuit U.S. Court of Appeals. Section 22B of the Organic Act of Guam, 48 U.S.C. § 1424-2, was amended by Section 2 of Public Law 108-378, 118 Stat. 2206, 2208 (Oct. 30, 2004), which terminated the Ninth Circuit review by certiorari of decisions of the Supreme Court of Guam. While this Court has always been the court of last resort, it is now the only federal court

with jurisdiction to review decisions from local Territorial courts of Guam interpreting questions arising under federal law.

RELEVANT STATUTORY PROVISIONS

48 U.S.C. § 1421a

> Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The Government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the Government of Guam of any of its lawful powers. The Government of Guam shall consist of three branches, executive, legislative and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of Interior.

48 U.S.C. § 1421g(d)

> (1) Attorney General of Guam. The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam. At such time as the Office of the Attorney General of Guam shall next become vacant, the Attorney General of Guam shall be appointed by the Governor of Guam with the advice and consent of the legislature, and shall serve at the pleasure of the Governor of Guam.

(2) Instead of an appointed Attorney General, the legislature may, by law, provide for the election of the Attorney General of Guam by the qualified voters of Guam in general elections after 1998 in which the Governor of Guam is elected. The term of an elected Attorney General shall be 4 years. The Attorney General may be removed by the people of Guam according to the procedures specified in section 9-A of this Act or may be removed for cause in accordance with procedures established by the legislature in law. A vacancy in the office of an elected Attorney General shall be filled–

(A) by appointment by the Governor of Guam if such vacancy occurs less than 6 months before a general election for the Office of Attorney General of Guam; or

(B) by a special election held no sooner than 3 months after such vacancy occurs and no later than 6 months before a general election for Attorney General of Guam, and by appointment by the Governor of Guam pending a special election under this subparagraph.

SOURCE: § 29 of Act of Aug. 1, 1950 (Organic Act). Codified as 48 U.S.C. § 1421g. Subsection (d) added by "The Guam Organic Act Amendments of 1998," HR 2370, enacted Oct. 1998, sec. 2.

Title 5 Guam Code Annotated § 3102

There is within the Executive Branch of the Government of Guam, a Department of Law. The Attorney General is head of the Department of Law and the Chief Legal Officer of the Government of Guam. The Attorney General shall be appointed by

the Governor with the advice and consent of the Legislature for a four year term under the conditions set forth in § 30101 of this Title.

SOURCE: GOVERNMENT CODE § 5101, amended by P.L. 13-117 (December 27, 1975).

Title 5 Guam Code Annotated § 30101

(a) The Department of Law of the Government of Guam shall be administered by the Attorney General of Guam, who shall be elected by the people of Guam for a term of four (4) years.

* * *

(c) The Attorney General of Guam may be removed in the same manner as provided under the Organic Act of Guam for the removal of *I Maga'lahen Guåhan* [the Governor].

* * *

SOURCE: GOVERNMENT CODE § 7000; amended by P.L. 13-117, P.L. 13-133:4 (February 3, 1976). Repealed/reenacted by P.L. 25-44:3 (June 9, 1999). Compiler's Note: The Organic Act of Guam was amended to make the Attorney General, whether elected or appointed, the "Chief Legal Officer of the Government of Guam," and provided for the election of that officer as reflected in this Section. 48 U.S.C.A. § 1421g(d) as amended in October, 1998.

Title 5 Guam Code Annotated § 30103

Common Law Powers of Attorney General.

The Attorney General shall have, in addition to the powers expressly conferred upon him by this Chapter, those common law powers which include, but are not limited to, the right to bring suit to challenge laws which he believes to be unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary. The Attorney General may permit attorneys admitted to private practice in Guam or licensed collection agents to collect accounts or other obligations owing to the Government of Guam, or to any agency or instrumentality thereof, if such procedure would be in the interest of the Government and expedite the collection of said account or obligation. Any agency or instrumentality not operating under yearly appropriations from the Legislature may retain counsel of its choice for the collection of obligations in the same manner as it may be permitted to retain counsel in other matters as permitted by its enabling legislation. Guam Memorial Hospital may permit the Attorney General or attorneys admitted to private practice in Guam and agents or licensed collection agents to collect accounts or other obligations owing to Guam Memorial Hospital.

SOURCE: GOVERNMENT CODE § 7002, repealed/reenacted by P.L. 13-117 (December 27, 1975); amended by P.L. 13-149:9 (June 26, 1976).

Title 12 Guam Code Annotated § 1102

There is within, a public corporation and an autonomous instrumentality of, the Government of Guam called the Antonio B. Won Pat International Airport Authority, Guam, to be further identified as the Won Pat International Airport Authority, Guam.

SOURCE: GOVERNMENT CODE § 62001, as enacted by P.L. 13-57 (September 26, 1975). Amended by P.L. 23-69:1 (February 29, 1976). Amended by P.L. 25-93:2 (December 29, 1999).

Title 12 Guam Code Annotated § 1108

(a) The Board may also appoint a treasurer, a comptroller and an attorney, all of whom shall serve at the pleasure of the Board. Their duties and compensation shall be fixed by the Board. The Board may appoint one assistant to any such office. Any of the said offices may be consolidated into one person.

* * *

(c) The Attorney, who must have been admitted to the practice of law in Guam, shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The Attorney for the Authority shall represent the Authority in litigation concerning the affairs of the Authority.

SOURCE: GOVERNMENT CODE § 62007, as enacted by P.L. 13-57 (September 26, 1975).

STATEMENT OF THE CASE

The Organic Act of Guam, 48 U.S.C. § 1421 *et seq.*, functions as Guam's constitution. *See Haeuser v. Dept. of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); *Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980); *GIAA*, ¶ 21, 2005 WL 291577, ¶ 21.[1] Prior to 2002, with Guam's first Congressionally authorized, *elected* Attorney General, the Office of Attorney General was a cabinet position, appointed by the Governor of Guam for a term of years, whose powers and duties were established by local law. In 1998 the United States Congress amended Guam's Organic Act to specifically establish the Office of Attorney General as a "constitutional" office, and to designate its holder as the "Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1).

The 1998 Congressional amendments expressly authorized the Legislature of Guam to determine how this constitutional officer was to be selected, i.e., whether by election or appointment. It further authorized the local Legislature to establish procedures by which the Attorney General may be removed for cause. 48 U.S.C. § 1421g(d)(2). Although the amendments authorized the local Legislature to determine by which method the Office of Attorney General may be filled, and to fix procedures by which the Attorney General may be removed, conspicuously absent was any provision authorizing the local Legislature to prescribe the powers and duties of the Office of Attorney General or to

[1] The difference between Guam's "constitution" and a State's constitution is that the electorate of a State may propose, ratify and amend its own constitution, whereas a literal "Act of Congress" is required to amend the Organic Act of Guam.

otherwise fix the functions, and define the parameters of that Office.

On November 7, 2002 Douglas B. Moylan was elected as the Territory of Guam's first Organic Act empowered Attorney General. Mr. Moylan took office on January 6, 2003. Shortly after taking office, the newly elected Attorney General informed all Government of Guam line and autonomous agencies that he was prepared to begin rendering legal services. In response to this letter, the Guam International Airport Authority ("Airport Authority" or "GIAA"), an autonomous agency and instrumentality of the Government of Guam, notified the Attorney General that its Board had decided to hire private counsel and would not recognize nor utilize the legal services of the Attorney General's office. As authority for the position that it could unilaterally hire its own counsel without the consent of the Attorney General, the Airport Authority cited its enabling legislation, 12 G.C.A. § 1102 and 12 G.C.A. § 1108 (a) and (c), which were passed over twenty years before Congress amended the Organic Act of Guam to provide that the Attorney General shall be the "Chief Legal Officer of the Government of Guam."

On March 3, 2003, the Attorney General filed a complaint for temporary and permanent injunction and for declaratory judgment in the District Court for the Territory of Guam against William R. Thompson, in his official capacity as Executive Manager of the Airport Authority. The complaint sought a declaration that "the designation of Chief Legal Officer in 48 U.S.C. § 1421g(d)(1) pre-empts any laws of Guam respecting the distribution of powers and responsibilities between the Attorney General of Guam and private counsel representing government agencies and departments, said Federal law being determined to be the supreme law of the land." Four days later, on March 7, 2003,

in response to the Attorney General's complaint for federal declaratory relief, the Airport Authority filed a Petition for Writ of Mandamus in the Superior Court of Guam. The Airport Authority sought to compel the elected Attorney General by mandamus to perform his "statutory" duty of approving the Airport Authority's contract with private counsel. Due to the pendency of the Airport Authority's petition in the Superior Court of Guam, the District Court abstained on April 1, 2003, citing the *Younger* and *Burford* abstention doctrines.[2] The District Court's abstention order is presently pending on appeal in the United States Court of Appeals for the Ninth Circuit and is scheduled for oral argument on May 11, 2005. Meanwhile, the Airport Authority's petition for writ of mandamus proceeded to judgment in local court.

The Superior Court of Guam rendered its Decision and Order on May 12, 2003, directing the Attorney General to approve as to form and content a legal services contract between GIAA and a private law firm. Pet. App. B-1. A final judgment was entered on January 30, 2004. Pet. App. B-1. That judgment was appealed by the Attorney General and upheld by the Supreme Court of Guam on February 8, 2005. Pet. App. A-1. In its opinion affirming the judgment of the Superior Court of Guam, the Supreme Court of Guam held that while the 1998 Congressional amendments to Guam's Organic Act "bestowed common law powers and duties upon the Attorney General of Guam[,] . . . those common law powers and duties may be subject to increase, alteration or abridgement by the Guam Legislature." *A.B. Won Pat Guam International Airport Authority v. Moylan* ("*GIAA*"), 2005 Guam 5, 2005 WL91577, ¶ 2. Pet. App. A-2. And in the last paragraph of its decision, the Guam Supreme Court held

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[2] *See Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971); and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943).

"that the Attorney General, as Chief Legal Officer, is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or amended by statute." *Id.* ¶ 67. Pet. App. A-37. This petition for writ of certiorari follows.

STATUTORY BACKGROUND

In 1998 Congress amended the Organic Act of Guam, and established the Office of Attorney General as a "constitutional" Office, not merely authorizing Guam's local Legislature to establish the Office, but establishing the Office itself. *See* 48 U.S.C. § 1421g(d)(1). Previously, the Office of Attorney General was a creature of local law, *see, e.g.*, 5 G.C.A. § 3102, subject to appointment and removal by the Governor, and indeed dissolution altogether by the Legislature of Guam.[3] Now, however, federal law has established the Attorney General as the "Chief Legal Officer of the Government of Guam."

A comparison of the local statutes existing in 1998, with the 1997 bill introduced by Guam's Delegate to Congress Robert Underwood, and with the final legislation passed by Congress as 48 U.S.C. § 1421g(d)(1), reveals three critical points: First, a "constitutional" (Organic Act) amendment was unnecessary to create and empower the position of Attorney General, because the position and its duties already existed in local law. Second, the legislation originally introduced by Delegate Underwood would have

[3] Previously, 5 G.C.A. § 3102 provided: "There is within the Executive Branch of the Government of Guam, a Department of Law. The Attorney General is head of the Department of Law and the Chief Legal Officer of the Government of Guam. The Attorney General shall be appointed by the Governor with the advice and consent of the Legislature for a four year term under the conditions set forth in § 30101 of this Title."

permitted the local Legislature, as opposed to Congress, to create the Office of Attorney General, and the Legislature could have set the position's powers and duties. And third, the final version of the law Congress passed reserved no authority to the local Legislature to alter or abridge the powers and duties of the Office.

Nonetheless, on February 8, 2005 the Supreme Court of Guam held "that the 1998 Amendments bestowed common law powers and duties upon the Attorney General of Guam [but] that those common law powers and duties may be subject to increase, alteration or abridgement by the Guam Legislature." *A.B. Won Pat Guam International Airport Authority v. Moylan* ("*GIAA*"), 2005 Guam 5, 2005 WL 291577, ¶¶ 2, 62. Pet. App. A-2, A-34. The Court held "that the Attorney General, as Chief Legal Officer, is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or modified by statute." *Id.* ¶ 67. Pet. App. A-37.

It is of no small consequence that 12 Guam Code Annotated § 1108(c) vests the attorney for the GIAA Board and Executive Director with total authority to advise and represent the Airport Authority in all its legal affairs.[4] By

[4] The local law creating the Airport Authority was passed in 1975 and authorizing it to retain its own counsel, more than 20 years before the 1998 Congressional Amendments establishing the Office of Attorney General as Chief Legal Officer of the Government of Guam in the Organic Act. In passing the 1998 amendments to the Organic Act, Congress is presumed to have had knowledge of 12 G.C.A. § 1102. *See United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). Nonetheless, Congress did not exempt the Airport Authority, or any other autonomous agency, from the term "Government of Guam" as defined in 48 U.S.C. § 1421g(d)(1). The necessary conclusion is that Congress intended to have one coherent legal policy to be established by the Attorney General, who is the Chief Legal Officer for all Government of Guam agencies and instrumentalities.

holding that the Legislature of Guam is authorized to alter, abridge, restrict or modify the Attorney General's common law powers and duties established by Congress, the local courts have exalted local law over a Congressional enactment, and turned Guam's Organic Act on its head. The practical consequence of the Guam Supreme Court's holding is that Congress may, by amending the Organic Act, create a "constitutional" office within the Government of Guam, but the Legislature of Guam may, by local law, alter, abridge, restrict or modify the nature and function of that office to the degree that it renders the Congressional enactment superfluous, if not meaningless.[5]

There are no limitations expressed in the Organic Act upon the term "Chief Legal Officer" with respect to the powers, duties and functions of the Attorney General of Guam. Neither the Legislature of Guam, nor any other branch of government, is expressly authorized by Congress to intrude upon or otherwise usurp or diminish the powers and duties of the Office of Attorney General. The holding of the court below – that the Legislature of Guam could, by local act, alter or abridge the Congressionally established powers and duties of the Office of Attorney General, and remove from the purview of the Chief Legal Officer of the Government of Guam superintendence of the legal affairs of the agencies and instrumentalities which comprise that government – defies the Congressional enactment and is due to be reversed.

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[5] While the local Legislature may increase or add to the powers and duties of the Attorney General, given the "constitutional" status of the Office now, it may not diminish or reduce those powers. *Cf. American Legion Post 279 v. Barrett*, 20 N.E.2d 45, 51 (Ill. 1939) ("the General Assembly may not take away from a constitutional officer the powers or duties given him by the constitution"); and *People ex rel. Hartigan v. E & E Hauling*, 607 N.E.2d 165, 170 (Ill. 1992) ("although the legislature may add to the Attorney General's common law powers, it may not detract from them").

FACTUAL BACKGROUND

This case involves the intent of Congress in amending Guam's Organic Act in 1998, establishing the Office of Attorney General, designated by Congress as the "Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1). Prior to the Congressional amendments to the Organic Act, Guam already had a statutorily authorized Attorney General, subject to local legislative prescription and gubernatorial appointment, oversight and control. The question for Congress to consider was whether the Attorney General should continue to be a creature of local law, appointed by the governor and whose duties and responsibilities were subject to definition by the Legislature of Guam, or whether the Office of Attorney General should have "constitutional" status within the Organic Act itself.

A review of the Congressional history of the 1998 Amendments to the Organic Act, 48 U.S.C. § 1421g(d)(1), reveals that, contrary to the Guam Supreme Court's opinion, the Organic Act was not amended simply to authorize the Legislature to create an elected Office of Attorney General. The Guam Legislature's first suggestion was Bill Number 571. This bill would have transferred the supervision and control of the Attorney General from the Executive Branch to the Legislative Branch. Compiler of Laws Charles Troutman became involved in the debate surrounding the nature of the Office, and entered into a historic series of correspondence with Guam's delegate to Congress, Robert Underwood. Mr. Troutman responded to Bill Number 571 with a letter to Delegate Underwood, explaining that simply switching the possible influence over the Office from the executive to the legislative hardly met the objective of making the Office independent: "[T]he position, if you mention it at all, must be created by the Organic Act, not just

permitted." Letter from Charles H. Troutman to Congressman Underwood of April 1, 1997. Pet. App. C-3. Mr. Troutman wrote Delegate Underwood again on July 16, 1997, noting, "[I]f there is to be any substantive meaning to your amendment, the Attorney General needs to have some basic constitutional powers that are not subject to the Legislature's total will." Pet. App. D-1.[6]

On September 2, 1997 Compiler Troutman reiterated that the Attorney General as Chief Legal Officer must retain general supervisory control over the legal affairs of the Government of Guam in another letter to Delegate Underwood:

> I don't particularly care if the Prosecution Division is separated from the Attorney General, but only if there is enough control remaining in the Attorney General that he/she retains general supervision over the legal affairs of the Government of Guam. Most, if not all state attorneys general retain the power to file appeals [or] decline them, and to take over prosecutions in cases of conflicts of interests or other good reasons. . . .
>
> Concerning your Bill, I would hope that you can amend it to provide that the Attorney General, no matter how s/he is selected, has the "constitutional" duty of being the Chief Legal Officer of the

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[6] Gifted with prescience, Mr. Troutman also wrote, "I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having many and diverse legal 'empires' within the Government of Guam. This is the same idea expressed in the 1970 Illinois Constitution." Pet. App. D-2. That there may be separate counsel authorized by the Guam Legislature for autonomous agencies has never been an issue. The issue is who would be authorized under Guam's Organic Act to keep a "check on having many and diverse legal 'empires' within the Government of Guam."

> Government of Guam and has some "constitutional" tenure of office.

Pet. App. E-2.

On October 10, 1997, the 24th Legislature of Guam adopted Guam Resolution Number 186, which proposed to Congress that the Office of Attorney General should be organically created, but that its powers and duties were to be defined by the local Legislature. Resolution 186 suggested the following amendment to the language of H.R. 2370:

> The Attorney General shall be the Chief Legal Officer of the Government of Guam, *shall be vested with common law powers and such additional powers and duties as may be prescribed under the laws of Guam*, not inconsistent with this chapter. The Attorney General shall prosecute all criminal violations of Guam law, provide legal advice to the government, and represent the government in all civil cases in which the Government of Guam may be interested . . . .

Guam Resolution No. 186 (emphasis added).

If Congress had intended the Legislature of Guam to have the authority to establish an elected Office of Attorney General, subject to definition by the local Legislature, that would have been an easy task. Unlike the Organic Act provisions pertaining to the Office of Attorney General, the Organic Act elsewhere expressly authorizes the local Legislature to prescribe the powers and duties of other elected "constitutional" officers such as Lieutenant Governor, Public Prosecutor and Public Auditor. *See, e.g.*, 48 U.S.C. § 1422 ("The Lieutenant Governor shall have such executive powers and perform such duties *as may be*

assigned to him by the Governor or prescribed by this chapter *or under the laws of Guam.*") (emphasis added); 48 U.S.C. § 1421g(c) ("The Government of Guam *may by law establish* an Office of Public Prosecutor and an Office of Public Auditor.") (emphasis added).[7]

Congress has, in various ways and over time, authorized the Legislature of Guam to create specific offices and officers, and to define their powers and duties. In each of these cases, Congress' intent has been quite explicit. With respect to public health, the Organic Act provides: "*Subject to the laws of Guam*, the Governor shall establish, maintain, and operate public health services in Guam, including hospitals, dispensaries, and quarantine stations, at such places in Guam as may be necessary...." 48 U.S.C. § 1421g(a) (emphasis added). With respect to public education, Congress amended the paragraph (b) of § 1421g

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[7] The Offices of Public Prosecutor and Public Auditor differ from the Office of Lieutenant Governor and Office of Attorney General because the Organic Act does not itself create the Office of Public Auditor or Public Prosecutor, but merely authorizes the Legislature to do so. The same is true of Guam's Civil Service Commission. "The Government of Guam *may by law establish* a Civil Service Commission to administer the merit system." 48 U.S.C. § 1422c(a) (emphasis added). But Congress made no such provision for the local Legislature with respect to the Office of Attorney General. If the Legislature were to decide not to create the Office of Public Prosecutor, Public Auditor, or a Civil Service Commission (as it has to-date in the case of the Public Prosecutor), it could do so. Furthermore, if an office may be created by the local Legislature, then it may in turn be abolished by the local Legislature. Not so with the Office of Attorney General, as it is the Congress, not the local Legislature, which has established the Office and defined its powers. And yet, the practical effect of the Guam Supreme Court's opinion authorizes the Legislature of Guam to strip away all core powers and duties of the Office of Attorney General to the point that it may become a mere a shell, a "constitutional" Office in name only. The logical consequence of the decision is that the local Legislature could abolish the Office altogether.

to provide: "The Government of Guam shall provide an adequate public educational system of Guam, and to that end shall establish, maintain, and operate public schools *according to the laws of Guam*." 48 U.S.C. § 1421g(b) (emphasis added). Previously, the Governor had sole responsibility under the Organic Act to establish the public education system on Guam. It is not insignificant that paragraphs (a) through (c) of 48 U.S.C. § 1421g provide separately for the establishment *by law* for public health, public education, public auditor and public prosecutor, but that ¶ (d) is deafeningly silent with respect to the Legislature's authority to provide *by law* for the Office of Attorney General.

The amendments to the Organic Act proposed by the local Legislature, if enacted, would easily have ended this case before it even began. Guam Resolution 186, rejected by Congress, is the very result obtained by the respondent in the court below. Taken together with the fact that everywhere else in the Organic Act Congress explicitly authorized the local Legislature to prescribe the powers and duties of an office, the intentional failure to adopt proffered language authorizing the local Legislature to prescribe the powers and duties of the Office of Attorney General manifests a Congressional intent that the local Legislature was not to have such authority. [8]

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[8] *Cf. Nelson v. Ada*, 878 F.2d 277, 281 (9th Cir. 1989) ("Congress was presented with, and rejected, a provision drafted by the board of education which would have expressly required that the school board be elected."). *See Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291 (2000) (against a backdrop of a distinct regulatory scheme, rejection by Congress of proposals to grant FDA jurisdiction to regulate tobacco is probative of intent to deny jurisdiction); *accord Whitman v. American Trucking Ass'n.*, 531 U.S. 457, 121 S. Ct. 903 (2001).

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS EXPRESSED ESPECIAL CONCERN WHEN NON-ARTICLE III TERRITORIAL COURTS INTERPRET FEDERAL LAW WITHOUT REVIEW BY ARTICLE III COURTS

Historically, this Court has expressed particularized concern when presented with the possibility that decisions of territorial courts that turn on questions of federal law may have no chance of being reviewed by an Article III court. In *Territory of Guam v. Olsen*, 431 U.S. 195, 97 S. Ct. 1774 (1977), this Court interpreted an amendment to the Organic Act of Guam which provided that the District Court of Guam "shall have such appellate jurisdiction as the [Guam] Legislature may determine." The question was whether, in authorizing the local Legislature to determine cases over which the federal District Court may have appellate jurisdiction from local courts, Congress had conferred upon the Guam Legislature the authority and discretion to *divest* the District Court of appellate jurisdiction in federal question cases as well.[9] This Court held that in the absence of clear Congressional intent to authorize the Legislature of Guam to divest the District Court of appellate jurisdiction in cases turning upon questions of federal law, it was without authority to do so:

> First, we should be reluctant without a clear signal from Congress to conclude that it intended to

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[9] The District Court of Guam is an Article IV court, not an Article III court. *See Nguyen v. United States*, 539 U.S. 69, 72 n. 3, 123 S. Ct. 2130, 2133 n. 3 (2003); *Chase Manhattan (National Association) v. South Acres Development Co.*, 434 U.S. 236, 236-37, n.1, 98 S. Ct. 544, 545 n.1 (1978) (per curiam); *Olsen*, 431 U.S. at 196 n.1, 97 S. Ct. 1776 n.1.

> allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law. Important federal issues can be presented in cases which do not fall within the District Court's federal-question jurisdiction, because they do not "arise under" federal law, but instead fall within the exclusive jurisdiction vested in the Superior and Supreme Courts by the Reorganization Act.

Olsen, 431 U.S. at 201, 97 S. Ct. at 1778-79.[10]

Now that Congress has amended the Organic Act to remove all supervision of the local courts from the Ninth Circuit Court of Appeals, this case presents the very real possibility, as arose in *Olsen*, that cases first decided by the local courts of Guam that "arise under" federal law may entirely escape review by any Article III court.

This dispute was originally brought by the Attorney General of Guam, Douglas B. Moylan, in the District Court of Guam seeking a declaratory judgment action interpreting the Organic Act of Guam. Four days later, the respondent in federal court brought this action in the Superior Court of Guam. The District Court dismissed the first action on the basis of *Younger* and *Burford* abstention. While the dismissal of that case has been appealed to the Ninth Circuit, the case at bar proceeded to trial and judgment in the Superior Court

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[10] By comparison, on the merits of the question presented here, absent express authority, the fact that Congress authorized the Legislature of Guam to determine the manner in which the Attorney General of Guam shall be selected, i.e., appointed or elected, and removed, does not necessarily imply a grant of Congressional authority to the local Legislature to determine the nature and function of the Office of Attorney General itself.

and was affirmed on appeal by the Supreme Court of Guam. Thus, the Airport Authority won the proverbial race to the courthouse.[11]

The District Court's decision to abdicate the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 1246 (1976), and to abstain pending local court review of the identical federal question presented has now worked the very same result expressly disapproved by this Court in *Olsen*, namely that an Article III court would be precluded from deciding questions arising under federal law, in particular, the Organic Act of Guam. If this Court does not grant the petition for writ of certiorari, the probability that no Article III court will have the opportunity to resolve this critical question of federal law will become a *fait accompli*, and a local territorial court will become the final arbiter of Congressional intent.

[11] The Airport Authority's race to and through the local courts is thus a double victory Congress could not have intended: First, the Guam Supreme Court committed demonstrable error in its analysis of Congressional intent; and second, in the event this Court does not grant the petition for review by certiorari, the Airport Authority will have succeeded in precluding appellate review by an Article III court of the federal question presented.

II. THE SUPREME COURT OF GUAM HAS DEVIATED FROM THIS COURT'S PRECEDENTS IN SIMILAR CASES CONSTRUING THE ORGANIC ACT OF GUAM

Since the creation of civil government for the Territory of Guam by Congress in 1950,[12] this Court has had three occasions to interpret the Organic Act of Guam. Each case makes clear that, absent a clear signal from Congress, and absent explicit evidence of Congressional intent, the local Legislature is not permitted to define the parameters of an Office established in Guam's Organic Act.

In *Territory of Guam v. Olsen*, 431 U.S. 195, 97 S. Ct. 1774 (1977), this Court stated that it was "reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, or decisions of territorial courts in cases that may turn on questions of federal law," 431 U.S. at 201, 97 S. Ct. at 1778, merely because Congress authorized the local Legislature to determine what cases may be appealed from the local courts to the District Court. Stated differently, this Court declined to conclude, without a clear signal from Congress, that a grant of authority to the local Legislature authorizing it to determine what appellate jurisdiction the District Court may have with respect to cases filed in the local courts carried with it the concomitant authority to divest that court of appellate jurisdiction it otherwise possessed. Similarly here, the grant of authority to the local Legislature to ascertain the manner of selection and removal of the Attorney General

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[12] For brief histories of the evolution of Guam's civil government, see *Ngiraingas v. Sanchez*, 495 U.S. 182, 186, 110 S. Ct. 1737, 1740 (1990); and *In re: Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam*, 2004 Guam 10, ¶¶ 19-32, 2004 WL 1293239 (Guam 2004).

does not carry with it the concomitant authority to define the powers and duties of the Office itself.

In *Chase Manhattan Bank (National Association) v. South Acres Development Co.*, 434 U.S. 236, 98 S. Ct. 544 (1978) (per curiam), this Court declined to infer that Congress' grant of federal question jurisdiction to the District Court of Guam, an Article IV court, also implied a grant of diversity jurisdiction: "Because Congress has neither explicitly nor implicitly granted diversity jurisdiction to the District Court of Guam, we reverse." *Id.* at 236, 98 S. Ct. at 545. Similarly here, because Congress neither explicitly nor implicitly authorized the Guam Legislature to alter, abridge, restrict or modify the powers of the Attorney General, as it has done so clearly with respect to other Organic Act officers, the decision of the Supreme Court of Guam is due to be reviewed by this Court. Construing what inferences may be drawn from Congressional silence, this Court in *Chase Manhattan Bank* construed that silence against a broad grant of jurisdiction which might otherwise have been easily and explicitly conferred. "Conspicuously absent in this provision [granting federal question jurisdiction] is any mention of diversity jurisdiction." *Id.* at 237, 98 S. Ct. at 545. In this case, conspicuously absent is any mention of the local Legislature's authority to alter, abridge, restrict or modify the common law powers of the Attorney General's Office. In direct contravention of this Court's teaching in *Chase Manhattan Bank*, the Guam Supreme Court nonetheless found the Legislature of Guam had authority that Congress neither explicitly nor impliedly had conferred.

Finally, in *Gutierrez v. Ada*, 528 U.S. 250, 120 S. Ct. 740 (2000), a unanimous court held, per Justice Souter, that "where a word is capable of many meanings" courts should not impute "'unintended breadth to the Acts of Congress.'" 528 U.S. at 255, 120 S. Ct. at 744 (quoting *Jarecki v. G.D.*

Searle & Co., 367 U.S. 303, 307, 81 S. Ct. 1579 (1961)). In *Gutierrez*, this Court declined to impute more to Congressional intent than was explicit in the Act under consideration, particularly if it were to lead to an odd or irrational result. But that is precisely what occurred in the court below. For, the power to alter, abridge, restrict or modify is the power to abolish and destroy. Absent explicit authority conferred by Congress, the local Legislature is not authorized to destroy an Office created by Congress itself.

III. THE SUPREME COURT OF GUAM'S OPINION DIRECTLY CONFLICTS WITH NINTH CIRCUIT U.S. COURT OF APPEALS DECISIONS INTERPRETING THE ORGANIC ACT OF GUAM

The Guam Supreme Court's decision is also in conflict with two critical cases from the Ninth Circuit Court of Appeals construing the Guam Legislature's authority under the Organic Act. *See Bordallo v. Baldwin,* 624 F.2d 932 (9th Cir. 1980), and *Nelson v. Ada,* 878 F.2d 277 (9th Cir. 1989). The question presented in the first case was whether the Governor's Organic Act powers could be reduced by the local Legislature. The Ninth Circuit Court of Appeals held that the Organic Act did not authorize the Legislature to reduce the Governor's authority to a mere ministerial function, stating:

> The question presented to us then is whether, when the Governor is specifically charged by Section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining, and operating hospitals, the Legislature may, within the terms of that act, reduce his function with respect to the governance of the Hospital to the mere ministerial function of

> validating the appointments made by others to the Hospital's governing body. We think it cannot.

Bordallo v. Baldwin, 624 F.2d at 934. Congress "specifically charged [the Governor] . . . with the responsibility for establishing, maintaining, and operating hospitals." Congress specifically charged the Attorney General with the responsibility to be the "Chief Legal Officer for the Government of Guam." The Organic Act is totally devoid of any authority from Congress to the local Legislature to alter, abridge, restrict or modify the parameters of the Office of Attorney General. Nonetheless, the Guam Supreme Court affirmed the Superior Court's Decision and Order directing the Attorney General to perform a ministerial act and sign a contract for legal services between an instrumentality of the Government of Guam and a private law firm not subject to the Congressionally mandated supervision, direction and control of the Chief Legal Officer for the Government of Guam.

In *Nelson v. Ada*, citing *Bordallo v. Baldwin* with approval, the Ninth Circuit declined, in the absence of any evidence of Congressional intent, to apply amendments to Guam's Organic Act retroactively in order to validate inconsistent local laws that would have stripped the Governor of appointment authority to local school boards:

> The language of the amendment to the Guam Organic Act itself says little about Congress' intent to ratify any preexisting scheme of selection of school board members under local law. The evidence of legislative intent in the legislative history of the amendment is sparse and equivocal.

Nelson, 878 F.2d at 280. Thus, according to Ninth Circuit precedent, when Congress is silent, or the evidence is "sparse

and equivocal," local laws in conflict with the distribution of powers of "constitutional" officers under the Organic Act are not to be retrospectively validated, as though Congress would impliedly approve. Again, if Congress had intended to ratify preexisting local laws, defining the powers and duties, and limitations, on the Office of Attorney General, all it had to do was add the phrase "and shall have such powers and duties as may be prescribed under the laws of Guam."

The Guam Supreme Court's opinion directly conflicts with precedent from the Ninth Circuit Court of Appeals in holding that not only could the Legislature reduce the Congressionally conferred Organic Act authority of the Office of Attorney General, but that prior inconsistent local laws in conflict with the Organic Act could be validated retrospectively and given Organic Act imprimatur not otherwise expressly authorized by Congress.

IV. THE SUPREME COURT OF GUAM ERRED IN FINDING AN IMPLIED GRANT OF AUTHORITY TO THE LOCAL LEGISLATURE OF THE TERRITORY OF GUAM THAT CONGRESS HAD ELSEWHERE, AND SO OFTEN, GRANTED ONLY EXPRESSLY

Unlike separate provisions of the Organic Act which expressly authorize the Guam Legislature to prescribe the powers and duties of other offices, the Organic Act is silent with respect to its authority to prescribe the powers and duties of the Office of Attorney General. The Guam Supreme Court could only speculate, from silence, that Congress intended to maintain the status quo with respect to the Guam Legislature's previous authority to modify the powers and duties of the Attorney General, and that all it really intended to do was provide for a manner of selection of the Attorney General other than by gubernatorial appointment. *GIAA*, ¶ 31. Pet. App. A-16. ("Thus, it *appears*

that the provisions with respect to the Attorney General were in direct response to controversies resulting from the 'appointment nature' of the Attorney General.") (emphasis added).

If anything, according to this Court's precedent and precedent from the Ninth Circuit, speculation favors the opposite conclusion. The heart of the Guam Supreme Court's error is found at ¶¶ 41 and 42 of its opinion wherein it acknowledge the significance of Resolution 186 from the local Legislature that proposed to Congress that it would retain the authority to define the parameters of the Office of Attorney General:

> Even more important is that Congress *did not adopt such language*.
>
> Accordingly, contrary to the Attorney General's assertion that Congress clearly intended that his office be immune from all local control, the legislative and other history reflects [sic] that Congress in fact did not incorporate proposed amendments which would have clearly delineated the Attorney General's powers in relation to the Governor and the Legislature. For this reason, we find that the legislative and other history of section 1421g provide no guidance in our determination of whether the Attorney General, as Chief Legal Officer of the Government of Guam, is vested with all powers at common law, and if so, whether such powers may be altered by the Legislature.

GIAA, ¶¶ 41-42, Pet. App. A-22, A-23 (emphasis in original).

The Attorney General could not agree more that it is important that Congress *declined* to adopt the language tendered by the 24th Guam Legislature in Resolution 186. But, it appears that at this point the Guam Supreme Court simply threw up its hands and disregarded the Congressional history and context of the Act altogether. The fact that Congress rejected the Guam Legislature's proposal is important: When presented with the opportunity to authorize the Guam Legislature to vest the Attorney General with such powers and duties "as may be prescribed under the laws of Guam," Congress declined the invitation.

Should this Court grant review, the underlying question will be what Congress intended by the term "Chief Legal Officer of the Government of Guam." It is not expressly defined in the Organic Act, nor is the local Legislature expressly authorized to define it. In *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 121 S. Ct. 903 (2001), this Court considered whether ambiguities in the Clean Air Act ("CAA") authorized the Environmental Protection Agency to consider implementation costs in revising national ambient air quality standards. This Court first noted, "Words that can have more than one meaning are given context, however, by their surroundings." *Id.* 531 U.S. at 466, 121 S. Ct. at 909. This Court then held that a statutory "textual commitment of authority," *id.*, 531 U.S. at 468, 121 S. Ct. at 909, is required, and "therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id*, 531 U.S. at 467, 121 S. Ct. at 908. In the case at bar, the Guam Supreme Court failed to examine Congressional intent in the context of the Organic Act as a whole, "that has elsewhere, and so often," expressly granted the local Legislature authority to prescribe powers and duties of other Organic Act officers, yet is so

silent with respect to the Legislature's authority to define the Office of Attorney General.

In *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291 (2000), this Court held that the Food and Drug Administration ("FDA") did not have the statutory authorization to regulate tobacco products. This Court found it probative that Congress had been presented and rejected numerous proposals to give the FDA jurisdiction. "Congress considered and rejected several proposals to give the FDA the authority to regulate tobacco." *Id.* 529 U.S. at 147, 120 S. Ct. at 1308.

> Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, *squarely rejected proposals to give the FDA jurisdiction over tobacco*, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Id., 529 U.S. at 159-60, 120 S. Ct. at 1315 (emphasis added). Similarly here, against a backdrop of specific Congressional enactments explicitly authorizing the Legislature of Guam to prescribe powers and duties of other "constitutional" officers established in the Organic Act, rejection by Congress of a proposed amendment that would confer similar authority with respect to defining the parameters of the Office of Attorney General is probative of Congressional intent to deny the local Legislature that authority. Nonetheless, the Guam Supreme Court *implied* a broad grant of authority to

the local Legislature that Congress *explicitly* conferred with respect to every other office established in the Organic Act.

Unlike other "constitutional" officers established by Congress for the Territory of Guam, the Organic Act is silent as to the local Legislature's authority to prescribe the powers and duties of the Office of Attorney General. Congress knew full well how to authorize the local Legislature to prescribe the powers and duties of the Office of Attorney General, for it had done so numerous times with respect to other Territorial offices since 1950. Moreover, when presented with a proposed amendment from the local Legislature to expressly authorize the local Legislature to prescribe the powers and duties and define the parameters of the Office of Attorney General, Congress declined. The Supreme Court of Guam erred in its holding that the local Legislature has implied authority delegated from Congress that it only has explicitly with respect to every other officer established by Congress for the Government of Guam.

CONCLUSION

The Guam Supreme Court's decision "ignores the horse while concentrating on minute details of the cart's design." *Olsen*, 431 U.S. at 205, 97 S. Ct. at 1781 (Marshall, J., dissenting). Rather than ascertain what Congress intended by the term "Chief Legal Officer," and what role, if any, was left for the Legislature of Guam to define the powers and duties of the Attorney General, the Guam Supreme Court disregarded the legislative history of the amendments and the context of the Organic Act altogether, in an effort to superimpose Organic Act imprimatur on local Legislative acts in conflict with the text of Organic Act itself.

The Attorney General of Guam respectfully submits that the holding of the Supreme Court of Guam is incompatible with Congressional intent, and in conflict with controlling precedent from this Court and the Ninth Circuit Court of Appeals. Because this is a significant federal question of Congressional intent, that may never be reviewed by an Article III court, and because the decision of the Court below is in direct conflict with binding precedent from this Court and from the Ninth Circuit Court of Appeals, the Attorney General respectfully submits that the petition for certiorari is due to be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF GUAM

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,
by and through its Board of Directors,
Petitioner-Appellee,
vs.
DOUGLAS B. MOYLAN,
Attorney General of Guam
Respondent-Appellant,

Supreme Court Case No.: CVA04-008
Superior Court Case No.: SP0055-03
OPINION
Filed: February 8, 2005
Cite as: 2005 Guam 5
Appeal from the Superior Court of Guam
Argued and submitted on October 28, 2004
Hagåtña, Guam

Attorney for Respondent-Appellant:	Attorney for Petitioner-Appellee:
Robert M. Weinberg, Esq. Assistant Attorney General Office of the Attorney General Civil Division Guam Judicial Center, Suite 2-200E 120 West O'Brien Drive Hagåtña, Guam 96910	David A. Mair, Esq. Mair, Mair, Spade & Thompson A Professional Corporation Attorneys at Law 238 A.F.C. Flores Street Suite 801, Pacific News Building Hagåtña, Guam 96910

BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Chief Justice (Acting)[1]; JOHN A. MANGLONA and ALEXANDRO C. CASTRO, *Justices Pro Tempore*.

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[1] Chief Justice F. Philip Carbullido recused himself from deciding this matter. Associate Justice Tydingco-Gatewood, as the senior member of the panel, was designated as the Acting Chief Justice.

PER CURIAM:

[1] *This is an appeal from the* trial court's final judgment granting mandamus relief to the Guam International Airport Authority (GIAA), directing the Attorney General of Guam, Douglas B. Moylan, to approve as to form and legality a legal services contract between GIAA and a private law firm. The Attorney General asserts that when the United States Congress designated his office as the "Chief Legal Officer" of the Government of Guam through the 1998 Amendments to the Organic Act of Guam ("1998 Amendments"), common law powers attached to his office which cannot be modified, restricted, or removed by local legislation. As such, the Attorney General contends that Title 12 GCA §1108, which authorizes GIAA to retain outside counsel, and Title 5 GCA §30109, which authorizes GIAA to use its own legal counsel instead of the Attorney General to conduct civil actions in which it is an interested party, are unconstitutional.

[2] We hold that the 1998 Amendments bestowed common law powers and duties upon the Attorney General of Guam. We further hold that those common law powers and duties may be subject to increase, alteration or abridgement by the Guam Legislature. Because we hold that Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109 are valid exercises of the Guam Legislature's constitutional powers granted by the Organic Act, the trial court judgment is **AFFIRMED**.

I.

[3] In 1998, Congress amended the Organic Act to provide, among other things, that "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." 48 U.S.C. §1421g(d)(1) (West, WESTLAW through Dec. 23, 2004). Prior to the 1998 Amendments, the

Guam Legislature enacted legislation which authorized GIAA to retain private counsel. Title 12 GCA §1108(a) and (c) (2002). Also, prior to the 1998 Amendments, the Guam Legislature had enacted legislation prohibiting the execution of contracts for the services of legal counsel in the executive branch without the approval of the Attorney General as to form and legality. Title 5 GCA §§5121 and 5150 (2004).

[4] In a letter dated January 28, 2003, the Attorney General advised GIAA's Executive Manager that he had been informed of efforts to retain private counsel by government agencies such as GIAA. Appellant's Excerpts of Record ("ER"), pp. 68-70 (Letter from Moylan to Thompson of 1/28/03). The Attorney General noted that his approval was required "prior to any private attorney being retained to represent the government of Guam." *Id.* (alteration in original). The Attorney General further requested that GIAA execute a memorandum of understanding ("MOU") to begin our relationship." *Id.*

[5] On February 11, 2003, the MOU was sent by the Attorney General to GIAA, the thrust of which required that the Attorney General would hire the attorney to work for GIAA at GIAA's expense, and further, that GIAA would provide such attorney with supplies and equipment and one staff person at its expense. Appellee's Supplemental Excerpts of Record ("SER"). Tab 3 (Memorandum from Guthrie to Thompson of 2/11/03).

[6] A few days after completing the procurement process, on March 3, 2003, GIAA sent the executed legal services contract with the private law firm of Mair Mair Spade & Thompson to the Attorney General for his approval. Appellee's SER, Tab 6, Ex. 4 (Mair Decl.). That same day, the Attorney General filed suit in the District Court of Guam against the Executive Manager of GIAA. Appellee's SER,

Tab 6, Ex. 5 (Mair Decl., ¶8). The federal action was dismissed on April 1, 2003. Appellee's SER, Tab 11 (Order).

[7] GIAA filed a Petition for Writ of Mandamus against the Attorney General in the Superior Court of Guam on March 7, 2003. Appellant's ER, p. 1 (Petition for Writ of Mandamus). The Petition was granted by the trial court on May 12, 2003, Appellant's ER, p. 120 (Decision and Order on Writ of Mandate), and final judgment granting mandamus relief was filed on January 30, 2004. Appellant's ER, pp. 138-39 (Final Judgment Granting Peremptory Writ of Mandamus). This appeal followed.

II.

[8] This court has jurisdiction to "hear appeals over any cause in Guam decided by the Superior Court of Guam . . ." 48 U.S.C. 1424-1(a)(2) (West, WESTLAW through Dec. 23, 2004).[2]

[9] An appeal from trial court judgment granting mandamus relief, where there are no issues of fact in dispute, is reviewed *de novo.* *Holmes v. Territorial Land Use Comm'n,* 1998 Guam 8, ¶6.

[10] "Mandamus relief is an extraordinary remedy employed in extreme situations." *Guam Publ'ns, Inc. v. Superior Court,* 1996 Guam 6, ¶10. A writ of mandate may be used to compel the performance of a legal duty. Title 7 GCA §31202 (1994); *People v. Superior Court of Guam (Laxamana),* 2001 Guam 26, ¶12; *see also Envtl. Prot. Info. Ctr., Inc. v. Maxxam Corp.*, 6 Cal. Rptr. 2d 665, 670 (Dist.

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[2] At the time of the filing of this appeal from a judgment granting mandamus relief, this court's jurisdiction was based on Title 7 GCA §3107 (2004).

Ct. App. 1992) ("The [writ of mandate] lies to compel the performance of a legal duty imposed on a government official."). A writ may be issued where a beneficially interested party establishes that he has no plain, speedy and adequate remedy available at law. Title 7 GCA §31203 (1994); *Laxamana*, 2001 Guam 26 at ¶12.

III.

[11] In this case, a writ of mandate was issued to compel the Attorney General to approve as to form and legality the legal services contract between GIAA and the Mair law firm. The issue of whether the Attorney General has a legal duty to act and GIAA has a clear, present and beneficial right to performance of that duty, turns on a resolution of the constitutionality of Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109. In other words, we must first address whether Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109 are in conflict with the Attorney General's role as Chief Legal Officer. The answer to such inquiry requires this court to determine the broader issue of whether the Attorney General, as Chief Legal Officer of the Government of Guam, is vested with common law powers, and if so, the scope of such powers.

[12] The Attorney General argues that the Guam Legislature is without authority to diminish the powers and duties of the Attorney General, who, by virtue of the express language found in the Organic Act, is the Chief Legal Officer of the Government of Guam. In particular, the Attorney General argues that: (1) congressional history reflects that the legislative intent behind the 1998 Amendments was not merely to change the method of selecting the Attorney General, rather, the legislative intent was to incorporate the common law powers of the Attorney General, which would not be subject to prescription by the

Guam Legislature; (2) as Chief Legal Officer, the Attorney General is endowed with inherent common law powers, which include ensuring that a unified and consistent legal policy of the government of Guam is set, and being accountable for the conduct of all suits and other judicial proceedings involving the government of Guam; (3) because the Attorney General is the Chief Legal Officer of the Government of Guam, and because GIAA is an instrumentality of the government of Guam, it logically follows that, under the plain meaning rule, the Attorney General is the attorney for GIAA and (4) the approval of private counsel for GIAA involves a discretionary act, and therefore, mandamus will not lie to dictate the exercise of a such discretionary act in a particular manner. In support of his arguments, the Attorney General relies on case law from Illinois, Mississippi, Alabama, Washington, Indiana, Florida and California.

[13] GIAA opposes each of the Attorney General's contentions, and asserts that: (1) congressional history does not support the Attorney General's arguments, but rather, the legislative history is void of any indication that Congress intended to preempt, or restrict, the Legislature's powers to allow government agencies such as GIAA to retain independent counsel; (2) the Organic Act does not prohibit the Guam Legislature from limiting the powers of the Attorney General, and further, may permit government of Guam agencies to retain independent counsel; (3) local law has not been preempted by federal law; (4) mandamus relief is appropriate because the approval of contracts is purely a ministerial act; (5) the Attorney General is statutorily required to represent line agencies; and (6) the Guam Legislature, and not the Attorney General, is responsible for determining public policy. GIAA distinguishes the cases cited by the Attorney General and maintains that they are inapplicable to the facts before us, and therefore urges this

court to follow case law from the jurisdictions of Arizona, Kentucky, Missouri, North Dakota, Oklahoma and Utah.

[14] We begin our analysis with a discussion of the relevant statutory provisions.

A. Relevant Statutory Provisions

[15] The Attorney General contends that the local statutes which authorize the GIAA to retain outside counsel are inconsistent with the Attorney General provision found in section 1421g(d)(1) of the Organic Act, which provides that "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." 48 U.S.C. §1421g(d)(1).

[16] Specifically, Title 12 GCA §1108 authorizes GIAA to appoint an attorney, and further defines the attorney's role as counsel to GIAA. It provides in part:

> (a) The [GIAA] Board may also appoint . . . an attorney, all of whom shall serve at the pleasure of the Board. . . . (c) The Attorney, who must have been admitted to the practice of law in Guam, shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The Attorney for the Authority shall represent the Authority in litigation concerning the affairs of the Authority.

Title 12 GCA §1108 (2002).

[17] Guam's procurement laws requires that all legal services contracts for the executive branch be approved by the Attorney General. Specifically, Title 5 GCA §5121(b) states:

> No contract for the services of legal counsel in the Executive Branch shall be executed without the approval of the Attorney General. Nothing in this Section or Chapter shall preclude the Attorney General or his designee from participating in negotiations for any contract upon the request of the government officer or agency primarily responsible for such negotiations.

Title 5 GCA §5121(b) (2004).

[18] However, Title 5 GCA §5150 states that the Attorney General's role with respect to the approval of procurement contracts is to determine correctness as to form and legality. Section 5150 states:

> The Attorney General, the Deputy Attorney General or such Assistant Attorneys General as the Attorney General may designate, shall serve as legal counsel and provide necessary legal services to the Policy Officer and the General Services Agency. *The Attorney General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality.* In making such a determination of legality, he may require any or all agencies involved in the contract to supply him with evidence that the

> required procedures precedent to executing the contract were carried out. He may prescribe the forms and format required to be followed by the agencies in aiding him in his determination of legality.

Title 5 GCA §5150 (2004) (emphasis added).

[19] Moreover, although the Attorney General is authorized to institute civil actions on behalf of the Government of Guam, an individual agency such as GIAA may instead utilize its outside counsel for such purposes. Specifically, Title 5 GCA §30109(c) states that the Attorney General may "[c]onduct on behalf of the government of Guam all civil actions in which the government is an interested party; provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General." Title 5 GCA §30109(c) (2003).

[20] Accordingly, the issue for this court's determination is whether the above statutory provisions are in conflict with the Attorney General's role as Chief Legal Officer and thus unconstitutional. As previously stated, the answer to such issues requires this court to determine, in the first instance, whether the Attorney General, as Chief Legal Officer of the Government of Guam b virtue of the Organic Act, is vested with all powers at common law, and if so, whether such powers may be altered by the Legislature.

B. The Legislature's Organic Act Powers and Constitutional Challenges to Local Law

[21] "The Organic Act serves the function of a constitution for Guam." *Hauser v. Dep't of Law,* 97 F.3d 1152, 1156 (9th Cir. 1996); *see also* *People v. Perez,* 1999

Guam 2, ¶15 ("Until Guam creates its own Constitution, the Organic Act of Guam is the equivalent of Guam's Constitution."). Section 1423a of the Organic Act, as amended by Congress in 1998, states that "[t]he legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam." 48 U.S.C. §1423a (West, WESTLAW through Dec. 23, 2004). Congress' intent in amending section 1423a was to "clarify[y] the legislature's power[s] 'to provide Guam with a greater measure of self-government.'" *In re Request of Gov. Felix P. Camacho Relative to the Interpretation and Application of Section 6 and 9 or the Organic Act of Guam*, 2004 Guam 10, ¶33 (quoting H.R. Rep. No. 105-742 (1998), 1998 WL 658802 at *3). While we recognize the broad authority granted the Legislature in the Organic Act, we are equally cognizant of the "well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act." *In re Request of Gov. Felix P. Camacho Relative to the Interpretation and Application of Section 11 of the Organic Act of Guam*, 2003 Guam 16, ¶15 n.5; *see also Haeuser*, 97 F.3d at 1156 (observing that "Guam's self-government is constrained by the Organic Act, and [thus] the courts must invalidate Guam statutes in derogation of the Organic Act."). Whether a law or statute violates the Organic Act is a question of law. *See Perez*, 1999 Guam 2 at ¶6.

[22] In assessing whether a law enacted by the Guam Legislature comports with the Organic Act, we "must begin with the general rule that legislative enactments are presumed to be constitutional." *In re Request of Gov. Carl T.C. Gutierrez Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1, ¶41. Here, the Attorney General raises the issue of whether Title

12 GCA §1108(a) and (c), which authorize GIAA to retain private counsel to represent its interests in legal matters, is unconstitutional because it is in derogation of 1421g of the Organic Act, which creates the Office of the Attorney General, and designates such officer as the Chief Legal Officer of the Government of Guam. Accordingly, the Attorney General bears the burden of proving the unconstitutionality of Title 12 GCA sections 1108(a) and (c). *Id.* ("[H]e who alleges the unconstitutionality of an act bears the burden of proof . . . ."). [T]he validity of sections 1108(a) and (c) "is to be upheld if at all possible with all doubt resolved in favor of legality[,] and unconstitutionality will be decreed only when no other reasonable alternative presents itself." *Id.*

C. Chief Legal Officer of the Government of Guam

1. Legislative and Other History

[23] The Attorney General argues that the congressional record with respect to section 1421g(d) of the Organic reflects that the "Attorney General is endowed with an entirely different character because it was 'organically' created by Congress, not created or defined in local law. And until Congress says otherwise, the Office is immune from local control, be that executive or legislative interference or prescription." Appellant's Opening Brief, p. 15 (June 14, 2004).

[24] The strongest piece of legislative history in support of the Attorney General's interpretation of the 1998 Amendments is the testimony and correspondence of the former Compiler of Laws Charles Troutman, in response to the amendments proposed by former Congressman Robert Underwood, Guam's congressional delegate. More specifically, in a letter dated July 16, 1997 to Congressman

Underwood, the Compiler stated, *inter alia,* that "if there is any substantive meaning to your amendment, the Attorney General needs to have some basic constitutional powers that are not subject to the Legislature's total will." Appellant's ER, p. 37 (Letter from Compiler to Congressman Underwood of 7/17/97). Thus, the Compiler recommended the following language, which he claims "is the same idea as expressed in the 1970 Illinois Constitution:

> [The legislature shall] set forth the duties and compensation of the Attorney General, *who, in addition,* shall be the chief legal officer of the Government of Guam having cognizance over all legal matters in which the government is anywise interested.

Id. at p. 37. Explaining the above language, the Compiler further stated, "I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having many and diverse legal "empires" within the government of Guam." *Id.* at p. 37. It is important to note, however, that the bill apparently was not amended to reflect the Compiler's changes.

[25] Furthermore, in his testimony before the Committee on Resources, on October 29, 1997, the Compiler opined that "the present proposal is seriously deficient."[3] Appellant's ER, p. 42 (Acting Attorney General Charles H. Troutman, Witness Testimony before the Comm. on Resources (Oct.

[3] Note that the Compiler enumerated three reasons for the deficiency: first, he recommended repeal of the language regarding the public prosecutor, second, he recommended clarification of the duties of the Attorney General; third, he recommended strengthening the tenure of the office so that the Attorney General could only be removed for cause if appointed, and by recall, if elected. Only the issue regarding the duties of the position are relevant for our purposes and thus, it is not necessary to discuss the Compiler's other concerns.

29, 1997)). The Compiler expressed no preference for either an appointed or elected Attorney General, as long as the position was created in the Organic Act, and "the overall duties and functions [are] provided [for] in the Organic Act, much as is found in the Constitution of the State of Illinois." *Id.* The Compiler suggested the following language: "The Attorney General shall be the chief legal officer of the territory of Guam and shall have such other duties and such compensation as the Legislature may provide by law." *Id.* Significantly, Congress did not add the language suggested by the Compiler.

[26] While the Compiler clarified his stance on the constitutional role of the Attorney General, his proposed amendments were not wholly adopted by Congress. Thus, his comments are not relevant to the issue of whether the Legislature may authorize agencies to hire outside counsel. Rather, because Congress apparently decided not to insert *any* language regarding the Legislature's authority in relation to the powers and duties of the Attorney General, it appears that Congress preferred not to tie the hands of the Legislature in this regard.

[27] Based on our review of the legislative and other history surrounding section 1421g of the Organic Act, which we discuss in detail below, we reject the Attorney General's assertion that congress intended that his office be immune from all legislative control.

[28] The office of the Attorney General as it exists today was constitutionally created by virtue of the Guam Organic Act Amendments of 1998. H.R. 2370, 105th Cong. (1998). Codified at 48 U.S.C. §1421g, the provision relative to the Attorney General states in its entirety:

(d) Attorney General

(1) The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam. At such time as the Office of the Attorney General of Guam shall next become vacant, the Attorney General of Guam shall be appointed by the Governor of Guam with the advice and consent of the legislature, and shall serve at the pleasure of the Governor of Guam.

(2) Instead of an appointed Attorney General, the legislature may, by law, provide for the election of the Attorney General of Guam by the qualified voters of Guam in general elections after 1998 in which the Governor of Guam is elected. The term of an elected Attorney General shall be 4 years. The Attorney General may be removed by the people of Guam according to the procedures specified in section 1422d of this title or may be removed for cause in accordance with procedures established by the legislature in law. A vacancy in the office of an elected Attorney General shall be filled-

(A) by appointment by the Governor of Guam if such vacancy occurs less than 6 months before a general election for the Office of Attorney General of Guam; or

> (B) by a special election held no sooner than 3 months after such vacancy occurs and no later than 6 months before a general election for Attorney General of Guam, and by appointment by the Governor of Guam pending a special election under this subparagraph.

48 U.S.C. §1421g.

[29] "As reported from the Committee on Resources, the purpose of H.R. 2370 [was] to amend the Organic Act of Guam to clarify local executive and legislative provisions in such Act." H.R. Rep. No. 105-742, 105th Cong. (1998), available at 1998 WL 658802, at *2. It is worth noting that while H.R. 2370 amended the Organic Act to create the office of the Attorney General and give such office the title of Chief Legal Officer of the Government of Guam, it also expanded the local legislative power to include *"all rightful subjects of legislation* not inconsistent with [the Organic Act]," in order to achieve "a greater measure of self-government equal to that of the U.S. Virgin Islands." *Id.* at *3 (emphasis added).

[30] Specifically in relation to the Attorney General provisions in H.R. 2370, the House Report states, *in its entirety:*

> *Guam's Attorney General is currently appointed* by the Governor of Guam with the advice and consent of the Guam Legislature. The appointment of the Attorney General is to a four year term or until the end of the term of

> the appointing Governor, whichever is sooner. The Governor may remove the Attorney General for cause.
>
> *Controversies have arisen in the past because of the appointment nature of the position of Attorney General.* Public concerns revolve around political interference with investigations, inefficiency of case work and dismissal of the Attorney General without cause.
>
> In response to the growing number of complaints, a survey was conducted to determine an acceptable resolution. It was clear that respondents (69%) favored an elected position. The survey also asked whether the position should be mandated by Congress, or left to the Guam Legislature to create. A slight majority of citizens favored local legislation. An amendment to Guam's Organic Act is needed to allow for an elected Attorney General. *This legislation provides a mechanism for elected legislators to act on this issue.*

Id. at *2-3 (emphasis added).

[31] Thus, it appears that the provisions with respect to the Attorney General were in direct response to controversies resulting from the "appointment nature" of the Attorney General. The House Report also alludes to a survey conducted on Guam which sought feedback from residents as to whether they desired an elected Attorney General, and if so, whether Congress should mandate the elected office, or whether the creation of the elected office should be left to

local legislators. According to the survey, 69% of respondents desired an elected Attorney General. Of the 69% desiring an elected Attorney General, a slight majority wished to leave the creation of the elected office to the local legislature. It can be argued that H.R. 2370 was thus a direct response by Congress to the desires of the people of Guam as reflected by the survey results – through the 1998 Amendments, Congress authorized the Legislature, if it so desired, to change the appointed nature of the Attorney General to an elected one.

[32] Moreover, with respect to committee action, the House Report states that an amendment by way of a substitute bill was offered an adopted by the committee. This substitute bill H.R. 2370 thus focused on changes regarding the *elective* nature of the Attorney General, and quorum size and powers of the Legislature. Specifically, the House Report provides:

> On July 29, 1998, the Committee met to mark up H.R. 2370. An amendment in the nature of a substitute to focus the changes to the Organic Act of Guam to provisions about *the election* of the Attorney General of Guam, quorum size, and clarification of legislative powers was offered by Mr. Underwood and adopted by voice. The bill was then ordered favorably reported to the House of Representatives by voice vote.

Id. at *3-4 (emphasis added).

[33] Similarly, in a subsequent report of the legislative and oversight activities of the Committee on Resources during the 105th Congress, the committee reported that it "passed the 'Guam Organic Act Amendments' (H.R. 2370)

authorizing changes to the Federal law authorizing the government structure in Guam by allowing the people of Guam to determine if the Attorney General should be an elected office, adjust the size of the legislative quorum to a simple majority to correspond with the size of the legislature, and to clarify the authority of the legislature over local matters." *Id.* at *6.

[34] Upon review of the house reports, it is clear that Congress intended to respond to the controversies of the "appointment nature" of the Attorney General, and by virtue of the 1998 Amendments, "provide[d] a mechanism for elected legislators to act on this issue." H.R. Rep. No. 105-742, 1998 WL 658802 at *3. For this reason, the provisions of H.R. 2370 focused on "the election of the Attorney General of Guam." *Id.* Equally clear is that nothing in the House Report expresses or implies that Congress intended to grant all common law powers and duties to the Attorney General which could never be altered by the Legislature. In other words, the legislative history of section 1421g of the Organic Act provides no support for the Attorney General's assertion that Congress intended, by designating the Attorney General as the Chief Legal Officer, to prohibit the local legislature from altering powers that the office might otherwise possess at common law.

[35] Through testimony provided to the Subcommittee on Native American and Insular Affairs on July 24, 1996, Senator Barrett-Anderson discussed at length the importance of the creation of an *elected* Attorney General. *See* Cong. Testimony of Sen. Barrett-Anderson, July 24, 1996, 1996 WL 10830029. She stated, in relevant part:

> Why an elected Attorney General? Empowering the people of the Territory to elect their Attorney General is a statement of

> greater self-government on the part of the people of Guam. . . . Electing an Attorney General is not an unrealistic concept which seeks to create new legal theories of self-government . . . . Today 46 states elect their Attorney General under constitutional guidelines. . . . The people of Guam expect their Attorney General to protect their interest above all else. An appointed Attorney General, unfortunately, must respond to a great extent to the concerns of the Governor. The Attorney General of Guam has historically suffered from this dilemma. The people of Guam are frankly tired of the constant criticisms focused on the very position which the people demand the highest degree of legal integrity.

Id. Senator Barrett-Anderson's testimony focused solely on the *means* of selecting the Attorney General. She asserted that the people of Guam expect the Attorney General to protect their interest above all else, and for that reason, proposed that the only solution was to allow the citizens of Guam to elect the Attorney General. Moreover, focusing on the elective versus appointive nature of the Attorney General, Senator Barrett-Anderson also provided a prime, personal example of the conflict of interest that arises through the appointment nature of the Attorney General.[4]

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[4] Senator Barrett-Anderson testified that during her term as Attorney General, she advised the Governor of the unconstitutionality of a local law. However, because she was appointed by and answerable to the Governor, she hesitated to file a suit to enjoin him from executing the law, and further, she could not represent his interests when the law was challenged on appeal.

[37] At the July 24, 1996 oversight hearing in which Senator Barrett-Anderson testified, Chairman Elton Gallegly of the Subcommittee on Native American and Insular Affairs similarly expressed that the purpose of the 1998 Amendments was to create an elected office of the Attorney General. *See* Statement of Chairman Gallegly, July 24, 1996, 1996 Wl 10830027 ("The Legislature of Guam . . . requests that the Congress give Guam the authority to determine the method of selecting their attorney general. No doubt there is a compelling reason the Legislature identified *the selection of the attorney general* as a matter warranting a change in current law.") (emphasis added). Likewise, in a statement provided at the oversight hearing, Allen P. Stayman, Director of the Office of Insular Affairs, stated:

> The Legislature of Guam . . . requests that the Organic Act of Guam be *amended to require election of the Attorney General* of Guam. At present, the Attorney General is appointed by and serves at the pleasure of the Governor of Guam. I believe that the *issue of appointment or election* of the Attorney General is a local self-government issue, which should be decided in Guam.

Statement of Director Stayman, July 24, 1996, 1996 WL 10830030 (emphasis added).

[38] Senator Barrett-Anderson again testified before the subcommittee on October 29, 1997. *See* Cong. Testimony of Sen. Elizabeth Barrett-Anderson, Oct. 29, 1997, 1997 WL 14153025. At this time, the senator was particularly concerned with the language of H.R. 2370, which did not firmly establish the Attorney General as a co-equal executive branch position which fell outside of the Governor's general supervision and control powers. *Id.* She also took issue with

the language of H.R. 2370 which granted the Legislature the power to decide whether to create an elected office. *Id.* Rather, she urged Congress to mandate, through the Organic Act, that the position be elected. *Id.* On behalf of the 24th Guam Legislature, she transmitted her testimony, along with the Legislature's Resolution No. 186, which delineated the proposed changes to the Organic Act as she described. Seemingly, her primary and arguably sole concern, again, was the interference by the Governor inherent in an appointed position and the continued interference should Congress decide not to expressly except the Attorney General from the Governor's general supervision and control powers.

[39] Senator Ben Pangelinan's testimony before the committee similarly focused on the importance of insulating the Attorney General from the control of the Governor, b mandating the election of the office of the Attorney General. *See* Cong. Testimony of Sen. Ben Pangelinan, Oct. 29, 1997, 1997 WL 16138742. Senator Pangelinan testified, in relevant part:

> I further wish to convey the unequivocal desire of the people of Guam to elect their Attorney General. This expression of their desire has been reiterated and embodied in the resolutions overwhelmingly passed by both the Twenty-Third and the Twenty-Fourth Guam Legislature. The direct solution b the will of the people of Guam of the Attorney General is right, just, and prudent for the people of Guam to have an independent Attorney General, unfettered by incessant political intervention from a single individual.

. . . .

> Thus I seek a clear language that grants the people of Guam the right to elect our attorney general, so that we will have removed another obstacle t our self-governance and once again reaffirm our high level of political maturity.

Id.

[40] From the testimonies of both senators, it appears that the intent of the 1998 Amendments was to create in the Organic Act the *elected* office of the Attorney General and insulate such officer from the control of the Governor, and no more. Significantly, any and all concern regarding "political interference" was in reference to the Governor, and not the Legislature through its power to enact laws which arguably affect the powers and duties of the Attorney General, such as authorizing the retention of private counsel by government agencies.

[41] It is important to note that although neither senator discussed the powers or duties of the Attorney General, Resolution 186, passed by the 24th Guam Legislature and submitted to Congress, suggested the following amendment to the language of H.R. 2370:

> The Attorney General shall be the chief legal officer of the government of Guam, shall be vested with common law powers and such additional powers and duties as may be prescribed under the laws of Guam, not inconsistent with this chapter. The Attorney General shall prosecute all criminal violations of Guam law, provide legal advice to the government, and represent the government in all civil cases in which the government of Guam may be interested. . . .

Res. 186, 24th Guam Leg. First Reg. Sess. (1997).[5] Even more important is that Congress *did not adopt such language*.

[42] Accordingly, contrary to the Attorney General's assertion that Congress clearly intended that his office be immune from all local control, the legislative and other history reflects that Congress in fact did not incorporate proposed amendments which would have clearly delineated the Attorney General's powers in relation to the Governor and the Legislature. For this reason, we find that the legislative and other history of section 1421g provide no guidance in our determination of whether the Attorney General, as Chief Legal Officer of the Government of Guam, is vested with all powers at common law, and if so, whether such powers may be altered by the Legislature.

2. Common Law Powers

a. Jurisdiction Relied upon by the Attorney General

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[5] We note that the recital clauses do not discuss the powers or duties of the Attorney General. Rather, the recital clauses express the Legislature's desire to amend the proposed H.R. 2370 to create the elected office of the Attorney General and to insulate the officer from the general supervision of the Governor. Res. 186, 24th Guam Leg. First Reg. Sess. (1997). (stating the desire "to provide for an elected Attorney General of Guam, independent from the general supervision of the Governor ..."); *see* Cong. Testimony of Sen. Elizabeth Barrett-Anderson, Oct. 29, 1997, 1997 WL 14153025 ("The 24th Guam Legislature by Resolution #186 strongly advises that Congress enact an amendment that clearly, and unequivocally establishes the attorney general as a co-equal executive branch position."). Accordingly, the Legislature, through Resolution 186, included a proposed amendment to the Organic Act which would vest the executive power in "the Governor, the Lieutenant Governor, and the Attorney General."

[43] The Attorney General relies primarily on Illinois cases which hold that the Attorney General possesses all common law powers which cannot be regulated by the state legislature. The Illinois Supreme Court has observed: "[T]his court has consistently held, under both the 1870 and 1970 constitutions, that the Attorney General is the chief legal officer of the State; that is, he or she is 'the law officer of the people, as represented in the State government, and its only legal representative in the court.'" *Envtl. Prot. Agency (EPA) v. Pollution Control Bd.,* 372 N.E.2d 50, 51 (Ill. 1977) (quoting *Fergus v. Russel,* 110 N.E. 130, 143 (Ill. 1915)). Thus, the Illinois Attorney General, as chief legal officer of the State, "has the constitutional duty of acting as legal adviser to and legal representative of State agencies. He or she has the prerogative of conducting legal affairs for the State." *EPA,* 372 N.E.2d at 51.

[44] While the Attorney General's representation of the Illinois cases is accurate, his reliance on these cases is misplaced. A thorough review of the Illinois constitutional and case law history establishes that the Illinois Attorney General's powers stem from the Illinois Supreme Court's interpretation of the phrase "prescribed by law" as it appears in the Illinois constitution, and not from is designation as "Legal Officer."

[45] To begin with, the 1870 Illinois constitution created the office of Attorney General and provides that the Attorney General shall "perform such duties as may be prescribed by law." Ill. Const. of 1870, art. V, §1 ("The executive department shall consist of a Governor, Lieutenant Governor, Secretary of State . . . and Attorney General. . . . [who] shall perform such duties as may be prescribed by law"); *see People ex rel. Scott v. Briceland,* 359 N.E.2d 149, 153 (Ill. 1976) (recognizing the absence of the term "Legal Officer" in the 1870 constitution).

[46] The seminal case interpreting the 1870 constitutional provision with regard to the Attorney General's powers is *Fergus v. Russel,* 110 N.E. 130 (Ill. 1915). The court, construing the phrase "prescribed by law" as it existed in the 1870 constitution, rejected such language as limiting the Attorney General's powers to those specified by statute, and held that the term "law" includes common law. *Id.* at 143. The court specifically stated that "[t]he common law is as much a part of the law of this state, where it has not been expressly abrogated by statute, as the statutes, and is included within the meaning of this phrase." *Id.* Further, recognizing the common law history of the state, the court stated with respect to the powers of the Attorney General:

> Under our form of government all of the prerogatives which pertain to the crown in England under the common law are here vested in the people, and if the Attorney General is vested by the Constitution with all the common-law powers of that officer, and it devolves upon him to perform all the common-law duties which were imposed upon that officer, then he becomes the law officer of the people, as represented in the state government, and its only legal representative in the courts, unless by the Constitution itself or b some constitutional statute he has been divested of some of these powers and duties.

Id. The court in *Fergus* thus observed:

> By our Constitution we created this office by the common-law designation of Attorney General and thus impressed it with all its common-law powers and duties. As the

> office of Attorney General is the only office at common law which is thus created by our Constitution the Attorney General is the chief law officer of the state, and the only officer empowered to represent the people in any suit or proceeding in which the state is the real party in interest, except where the Constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official adviser of the executive officers, and of all boards, commissions, and departments of the state government, and it is his duty to conduct the law business of the state, both in and out of the courts.

Id. at 145.

[47] The court in *Fergus* unequivocally established the Attorney General as an officer "with expansive powers which the General Assembly lacked the power to diminish." Shawn W. Denny, *History of the Office of the Illinois Attorney General,* http://www.illinoisattorneygeneral.gov/about/history.html, (last visited Feb. 8, 2005). *See Briceland,* 359 N.E.2d at 153 ("The rationale of the *Fergus* decision is that the 1870 Constitution granted the Attorney General all the powers associated with that office at common law, and that, while the legislature could add to these powers, the legislature could not reduce the Attorney General's common law authority.")

[48] For many years following, every Illinois case which addressed the Attorney General's authority and held that the General Assembly could not diminish the powers of the Attorney General, relied on the *Fergus* decision and its interpretation of the 1870 constitution. The 1970 Illinois

constitution "continued the Office of the Attorney General as it had been established under the 1870 Constitution." Denny, *supra.* In the 1970 constitution, the office was thus described: "the Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law." Ill. Const. of 1970, art. V, §15 West, WESTLAW through Sept. 15, 2004). Significantly, the term "chief legal officer" does not even appear in the 1970 Illinois constitution. In fact, in designating the Attorney General as "legal officer," the delegates had no intention to either enlarge or diminish the powers of the Attorney General as it existed in the 1870 constitution. Rather, the delegates acknowledged the *Fergus* decision, and desired the law to remain status quo. *See Briceland,* 359 N.E.2d at 156 (recognizing, after a lengthy review of the constitutional debate, that it is clear "the delegates intended to retain the holding of *Fergus* that the Attorney General is 'the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the constitution or a constitutional statute may provide otherwise.'") (quoting *Fergus*, 110 N.E. at 145)).

[49] We decline to adopt the Illinois court's interpretation of its constitution. First, only two relevant words in the language in our Organic Act can be found in the 1970 Illinois constitution: legal officer. It is therefore unreasonable to assume, as the Attorney General asserts, that "the model for Guam's Attorney General was based upon the Illinois Attorney General Constitution," and even more unreasonable that this court should feel compelled to follow the Illinois court's interpretation. *See* Appellant's Opening Brief, p. 15 (June 14, 2004).

[50] Second, the Illinois line of cases was based on the 1870 constitution's language that the Attorney General had duties as "prescribed by law." Because that specific phrase,

in the context of the Illinois constitution, was presented to Congress through the testimony provided by the former Compiler of Laws, and obviously rejected, the *Fergus* case and all other cases which follow it, are completely inapplicable to the case before us.

[51] Third, the term "legal officer" as used in the 1970 Illinois constitution was not meant to "clarify" the powers of the Attorney General. In other words, the Illinois Attorney General's common law powers derive from the phrase "prescribed by law" and not "legal officer." In determining whether the Attorney General of Guam, as Chief Legal Officer, is vested with common law powers which cannot be diminished by the Legislature, Illinois cases in inapplicable as the use of the term "legal officer" had no effect on the state of Illinois law with regard to the source of the Attorney General's common law powers.

[52] Finally, the Illinois court's interpretation has been regarded as one which does not follow the general rule, but rather gives "the Attorney General of Illinois . . . perhaps the broadest power of all the Attorney General within the United States." David Edward Dahlquist, *Comment, Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Rules,* 50 DePaul L. Rev. 743, 765 (2000). Not surprisingly, the Illinois interpretation has received criticism. *See* EPA, 372 N.E.2d at 51 (where the Illinois Supreme Court noted that the court has not wavered since the *Fergus* decision despite criticism regarding the power granted to the to the Attorney General).

[53] The Attorney General also relies on cases from courts in Mississippi, Alabama, Washington, Indiana, California and Florida. However, GIAA correctly points out that in the cases cited from the jurisdictions of Mississippi, Alabama,

Washington and Indiana, the courts found that the respective state agency or board in question was without express statutory authority to retain independent counsel to represent its interests, and accordingly upheld the Attorney General's authority to represent the state entity. *See Wade v. Miss. Coop. Extension Serv.*, 392 F.Supp 229, 231 (N.D. Miss. 1975) (observing that under a Mississippi statute, the Attorney General has "the sole power to bring or defend a lawsuit on behalf of a state agency") (quoting Miss. Code Ann. §7-5-1 (West, WESTLAW through end of 2004 Regular and First Ex. Sess.)); *Ex Parte Weaver*, 570 So. 2d 675, 678-79 (Ala. 1990) (observing Alabama statute which states that "[a]ll litigation concerning the interests of the state, or any department thereof, shall be under the direction and control of the attorney general . . . .") (quoting Ala. Code §36-15-21 (West, WESTLAW through end of 2004 Regular Sess.)); *State v. Gattavara*, 47 P.2d 18, 21 (Wash. 1935) (observing that Washington law "did not give authority to departments to institute actions in their own right, but only in conjunction with the authority of the Attorney General," and further, under statutory law, "the Attorney General shall be the legal adviser to the joint board and represent it in all proceedings") (quoting Rem. Rev. Stat §7697)); *Banta v. Clark*, 398 N.E. 692, 693 (Ind. Ct. App. 1979) (observing that under Indiana law, "[n]o agency. . . shall have the right to name, appoint, employ or hire any attorney. . . to represent it or perform any legal services on behalf of such agency ... without the written consent of the attorney general.") (quoting Ind. Code §4-6-5-3 (West, WESTLAW through end of 2004 Regular Sess.)).

[54] In contract to the above jurisdictions, the Guam Legislature has expressly authorized GIAA to retain outside counsel to provide legal advice and represent its legal interests in any forum. *See* 12 GCA §1108(a) and (c). In fact, the agency is only required to receive the Attorney

General's approval of the legal services contract with respect to form and legality. *See* 5 GCA §5150.

[55] In California, state agencies "may employ special counsel to protect its rights, unless specifically prohibited from so doing by statutory or charter provisions. . . ." *State Comp. Ins. Fund v. Riley*, 69 P.2d 985, 987 (Cal. 1937). However, in *Riley,* the California Supreme Court found that the civil service laws specifically prohibited the retention of independent counsel, and thus found in favor of the Attorney General. *Id.* at 987. Again, in contrast, Guam statutes expressly allow GIAA to retain outside counsel. *See* 12 GCA §1108(a) and (c).

[56] Finally, the Florida case relied upon by the Attorney General does not provide support for the Attorney General's position. Rather, it supports GIAA. The case of *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 271 (5th Cir. 1976), was correctly cited by the Attorney General for the conclusion that, at common law, the Attorney General's powers included instituting, defending or intervening "in any litigation or quasi-judicial administrative proceeding which he determines in his sound official discretion involves a legal matter of compelling public interest." However, the Fifth Circuit Court also observed that such powers may be limited by the legislature. *Id.* at 268 (recognizing that "[t]here is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires."). This was true even where the constitution explicitly designated the Attorney General as Chief State Legal Officer of the state. *See* Fla. Const., art 4, §4(a) (West, WESTLAW through Nov. 2, 2004) ("There shall be a cabinet composed of an attorney general . . . they shall exercise such powers and perform such duties as may be prescribed by law.); Fla.

Const., art 4, §4(b) (West, WESTLAW through Nov. 2, 2004) ("The attorney general shall be the chief state legal officer.").

b. Other Jurisdictions

[57] Contrary to the Illinois line of cases which hold that the term "prescribed by law" means that the Attorney General has all common law powers which cannot regulated by the legislature, some courts have found that where the constitution provides that the attorney general shall have duties "as provided by law," such language is construed as completely removing all common law powers of the attorney general. *See In re Estate of Sharp,* 217 N.W.2d 258, 262 (Wis. 1974) (recognizing that "Wisconsin, unlike numerous states, has specifically circumscribed the powers and duties of the office of the Attorney General. Art. VI, Sec. 3 of the Wisconsin Constitution limits those powers and duties to those 'prescribed by law.' This constitutional principle has been interpreted by the courts in numerous decisions as removing from the office of the Attorney General any powers and duties which were found in that office under common law."); *Ariz. State Land Dep't v. McFate,* 348 P.2d 912, 914 (Ariz. 1960) (noting that "Article V. Section 1 Arizona Constitution, establishes the office of the Attorney General within the Executive Department of the State. Section 9 thereof provides: 'the powers and duties of Attorney General, shall be as prescribed by law.' This Court has held that the 'law' referred to in Article V, Section 9, is the statutory law of the State and not the common law."). Today, a mere seven states deny the Attorney General *all* common law powers. Dalhlquist, *supra* at 763. They include Arizona, Indiana, Iowa, Louisiana, New Mexico, South Dakota, and Wisconsin. *Id.* at n.148.

[58] In other states whose constitutions similarly include the phrase "prescribed by law" or a similar phrase, courts have held that while the Attorney General possesses common law powers, such powers may be modified by the Legislature. *See Johnson v. Commonwealth,* 165 S.W.2d 820, 829 (Ky. 1942) (recognizing that the state constitution authorizes the legislature to "prescribe" duties to the Attorney General and holding that "while the Attorney General possesses all the power and authority appertaining to the office under common law and naturally and traditionally belonging to it, nevertheless the General Assembly may withdraw those powers and assign them to others or may authorize the employment of other counsel . . . ."); *Shevin,* 526 F.2d at 270 (recognizing that, while the Attorney General possesses common law powers, such powers may be modified by statute); *State ex rel. Derryberry v. Kerr-McGee Corp.,* 516 P.2d 813, 818-19 (Okl. 1973) (holding that "[i]n the absence of express statutory or constitutional restrictions, the common law duties and powers attach themselves to the office as far as they are applicable and in harmony with our system of government.").

[59] Unlike a majority of jurisdictions, section 1421g of the Organic Act provides that the Attorney General shall be the chief legal officer of the government of Guam, however, aside from this, the Organic Act is silent as to the Attorney General's duties, or, for that matter, whether the duties are limited to that prescribed or provided by law. In states where the constitutions do not limit or define the attorney general's powers through the phrase "prescribed by law" or a similar phrase, it has been held that "[t]he absence of a [constitutional] provision for specific powers for the attorney general . . . vests the office with all of the powers of the attorney general at common law." *State ex rel. Nixon v. Am. Tobacco Co.,* 34 S.W.3d 122, 136 (Mo. 2000) (en banc) (interpreting the provision of the constitution which simply

provided that "[i]n addition to the governor and lieutenant governor, there shall be [an] attorney general.") (second bracket in original); *Bd. Of Pub. Util. Comm'rs v. Lehigh Valley R.R. Co.,* 149 A. 263, 266 (N.J. 1930) (citing with approval a New Jersey case that stated: "[e]xcept as modified by constitutional or statutory regulation, his [the attorney general's] functions here are similar to those exercised by the representative of the crown. . . ."); *Superintendent of Ins. v. Att'y Gen.,* 558 A.2d 1197, 1200 (Me. 1989) ("The Attorney General, in this State, is a constitutional officer endowed with common law powers. As the chief law officer of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and ma institute, conduct, and maintain all such actions and proceedings . . .") (citation omitted); *Watson v. Caldwell,* 27 So. 2d 524, 529 (Fla. 1946) (holding that the Internal Improvement Fund had the statutory authority to retain outside counsel and not use the Attorney General as counsel, despite his designation in the Florida constitution as Chief Legal Officer).[6]

[60] However, in these states, it is also held that while the attorney general's powers are broad, they are not without limit, and "[a]s with other common law precepts, the attorney general's authority can be restricted by a statute enacted specifically for the purpose of limiting his power."

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[6] Florida's constitution, like Guam's Organic Act, designates the Attorney General as the Chief Legal Officer. Fla. Const., art 4, §4(b) (West, WESTLAW through Nov. 2, 2004). However, Florida's constitution also states that the Attorney General's duties shall be "prescribed by law." Fla. Const., art 4, §4(a) (West, WESTLAW through Nov. 2, 2004). As previously discussed, in states where the constitutions *do not* limit or define the Attorney General's powers, courts have held, *consistent* with the Florida (any many other states similarly defining the term "prescribed by law"), that the Attorney General has common law powers which may be modified by statute.

Am. Tobacco, 34 S.W.3d at 136. It is also noted that the statute must actually limit the attorney general's powers, and that "[a] grant by statute of the same or other powers does not operate to deprive him of those belonging to the office under the common law, unless the statute, either expressly or reasonable intendment, forbids the exercise of powers not thus expressly conferred." *Id.* (quoting 6 C.J. 816).

[61] This preceding approach, applied in the absence of constitutional language defining or limiting the Attorney General's powers, is consistent with the line of cases holding that the legislature may add to or reduce the common law powers of the Attorney General. Indeed, it has been recognized that "[i]n many jurisdictions, the attorney general of a state, in addition to the powers conferred and duties imposed by statute, is charged with all the common-law powers and duties pertaining to the office as well, except insofar as they have been expressly restricted or modified by statute or the state constitution." 7 Am. Jur.2d *Attorney General* §7 (2004); *see also* Dahlquist, *supra* at 764 (stating that most jurisdictions follow the general rule that "unless a state legislature expressly terminates the common law powers of the Attorney General, it can be assumed that such powers are part of the office.").

[62] We therefore adopt the general rule and hold that the Attorney General, as Chief Legal Officer, in addition to the powers conferred and duties imposed by the Legislature, is charged with all the common-law powers and duties pertaining to the office, except insofar as they have been expressly restricted or modified by statute. Stated another way, "the common-law powers and duties of the attorney general are subject to increase, alteration, or abridgment b the legislature. . ." 7 Am. Jur.2d *Attorney General* §8 (2004). We note that this result is consistent with Title 5 GCA

§30103, which sates that the Attorney General has common law powers except as limited by statute.

c. Title 12 GCA §1108(a) and (c)

[63] Section 1108(a) and (c) expressly states that GIAA may appoint an attorney, and that such attorney may advise its officers, or the agency, on legal matters and represent the agency in any forum. Title 12 GCA §1108(a) and (c) ("The [GIAA] Board may also appoint . . . an attorney. . . [who] shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The Attorney for the Authority shall represent the Authority in litigation concerning the affairs of the Authority."). Moreover, Title 5 GCA §30109(c) states that the Attorney General may "[c]onduct on behalf of the government of Guam all civil actions in which the government is an interested party; *provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General.*" 5 GCA §30109(c) (emphasis added).

[64] Accordingly, we hold that Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109 are valid exercises of the Legislature's power to remove the common law power of the Attorney General to act as legal counsel to represent to the interests of GIAA, and do not violate the Organic Act.[7]

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[7] While we recognize the legislative authority, in this instance, to withdraw common law powers from the Attorney General, we note that at least one court had held that although the legislature "may withdraw those powers and assign them to others . . . the office may not be striped of *all* duties and rights so as to leave it an empty shell . . . ." *Johnson v. Commonwealth*, 165 S.W.2d 820, 829 (Ky. 1942) (emphasis added).

[65] It is clear that the Attorney General has the authority to review contracts with respect to their legality and form pursuant to Title 5 GCA §5150. However, when determining whether to approve or disapprove contracts, the Attorney General may only consider the legality and form of the proposed contract. *See Citizens Energy Coalition of Indiana v. Sendak*, 594 F.2d 1158, 1162 (7th Cir. 1979); *see also State ex rel. Fahlgren Martin, Inc. v. McGraw*, 438 S.E.2d 338, 344-345 (W. 'Va. 1993) (holding that reviewing a contract for "'form' does not include matters extrinsic to the actual contract"). Thus, the Attorney General has the legal duty to approve a contract which is lawful as to form and content. *See Sendak*, 594 F.2d at 1162 (holding that the Attorney General has no discretion to reject a contract that is lawful and correct in form).[8]

[66] In light of the constitutionality of Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109, we hold that the Attorney General has a legal duty to approve the legal services contract between GIAA and the Mair firm as to form and legality, and further, GIAA has a clear, present and beneficial right to the performance of the Attorney General's duty. We therefore affirm the trial court judgment granting mandamus relief to GIAA.[9]

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[8] We hesitate to call the review of a contract for form and legality a mere ministerial act or duty. *See Mother Goose Nursery Schs., Inv. v. Sendak*, 770 F.2d 668, 674 (7th Cir. 1985). However, once the Attorney General reviews a contract and determines that it is lawful as to form and content, a legal duty arises to approve the proposed contract. The Attorney General has not alleged that the contract at issue in this case is not lawful as to form or content.

[9] The trial court's judgment ordered the Attorney General to represent all executive line agencies. GIAA in its opening (opposition) brief agrees with such conclusion and raises several points regarding the Attorney General's duty to represent the line agencies. However, the Attorney General, as appellant, does not appeal from that portion of the trial court's judgment, nor does he address such argument in his Reply Brief.

IV.

[67] We hold that the Attorney General, as Chief Legal Officer, is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or modified by statute. Accordingly, we hold that Title 12 GCA §§1108(a) and (c) and Title 5 GCA §30109 are valid exercises of the Guam Legislature's constitutional powers granted by the Organic Act. The trial court's Judgment granting mandamus relief to GIAA is **AFFIRMED.**

It should be noted that GIAA's petition for writ of mandate requested no such holding from the trial court, nor was it addressed in the trial court's decision and order which formed the basis for the final judgment granting mandamus relief. Moreover, the interests of the various line agencies are not represented by any party in this proceeding. Thus, we do not address such issues in this opinion.

IN THE SUPERIOR COURT OF GUAM

A.B. WONPAT GUAM INTERNATIONAL AIRPORT, by and through its Board of Directors,	)	SPECIAL PROCEEDING CASE NO. SP0055-03
Petitioner,	)	
vs.	)	DECISION AND ORDER ON WRIT OF MANDATE
DOUGLAS B. MOYLAN, Attorney General of Guam,	)	
Respondent.	)	

BACKGROUND

This matter came before the Court on the 28th of March, 2003, on the Petitioner's petition for Writ of Mandamus. The Petitioner filed this Writ of March 7, 2003 and the Respondent filed an Ex-parte Motion to Stay on March 14, 2003 and it was heard on the same day. The Respondent filed an Opposition to the Writ of Mandamus of March 21, 2003. A Reply Memorandum in Support of the Writ was filed on March 25, 2003, by the Petitioner. An order denying the Motion to Stay was filed on April 14, 2003. Both parties submitted Supplemental Briefs on April 18, 2003. After hearing the arguments of both parties, the Court took the matter under advisement. The Court now issues its Decision and Order.

DISCUSSION

The Writ of Mandamus seeks relief as set forth in 7 GCA §31202 and §31203. The petitioner argues that the Guam International Airport Authority (GIAA) is a government agency that was created pursuant to Title 12 GCA §§1101. The Board of Directors oversees the operations of the GIAA. The argument is that under 12 GCA §1108(a) and (d), the GIAA has the express statutory right to retain independent legal counsel. Independent legal counsel may be retained, in place of the Attorney General, as stated in 5 GCA §30109. The Petitioner agrees that the AG must approve all contracts for professional services and is only permitted to participate in the negotiations of the contracts "upon the request" of the government agency. The AG's review of professional service agreements is limited to an inquiry as to the "correctness" of from and "legality" in order to confirm that the "required procedures" were followed toward the contract. On January, 2003, the Attorney General sent a letter to GIAA stating that prior to any private attorney being retained his approval was needed. The Attorney General also stated that the GIAA was the Attorney General's client and private counsel could not communicate with the Government of Guam without his office approval.

The GIAA retained the law firm of Mair, Mair, Spade and Thompson, as an independent counsel. The contract was signed by the Chairman of the Board, the Executive Manager and a representative of the firm. The contract was sent to the Attorney General's Office for review and signature, on March 3, 2003.

The Attorney General's office indicated that he does not intent to allow the GIAA the statutory right to retain the law firm as independent counsel. The GIAA argues that the

Attorney General has disregarded his statutory obligation by failing to permit the GIAA to retain counsel and by failing to approve the contract as required by law.

ANALYSIS

The Petitioner in this action first argues that the Attorney General's powers may be limited by the legislature. The Petitioner cites to cases that show that the Legislature may limit the authority of the Attorney General as well as "take away" the powers of an Attorney General and vest them elsewhere.

The Petitioner cites to Tarantino v. Board of Regents of the University of Guam, in which the Superior Court of Guam held that the powers of the Attorney General may be limited by statute:

> The statute prescribing the common law powers of the Attorney General explicitly states that 'the Attorney General shall have ...those common powers...unless expressly limited by any law of Guam to the contrary.' 5 GCA 30103...A review of the 1998 amendments to the Organic Act and the Organic Act itself grants no enhancement to the powers of the newly created Chief Legal Officer of Guam. Civil Case CV1455-00, Decision and Order at pp.9-10 (Super.Ct. Guam Dec.5, 2000).

The Petitioner notes that there is nothing in the plain language of the 1998 Amendments to the Organic Act that suggests that the powers of the Guam Legislature were being curtailed in relation to an elected Attorney General, if anything it expanded the powers of the legislature. The

Legislature has more power over the Attorney General as opposed to other state elected Attorney Generals. The Guam Legislature may decide whether to have an elected or appointed Attorney General, decide upon the procedures by which the Attorney General may be removed "for cause".

The second issue raised by the Petitioner is that the Legislature may permit government agencies to retain independent counsel. The Petitioner cites to Hansen v. Utah State Requirement Board, 652 P.2d 1332 (Utah 1982), in which the court stated, "As to each defendant, the Legislature has conferred specific statutory authority authorizing the employment of independent counsel ... Thus, the authority for each defendant to hire independent counsel has a clear statutory foundation."

They also cite to Fund Manager, Public Safety Retirement System v. Superior Court of the State of Arizona, 731 P.2d 620 (Ariz. 1986), in which the Attorney General assisted the private counsel to submit all opinions and advice to the Attorney General for review. The court stated:

> The factual issue in this special action is whether the attorney general may require, as a condition to approval of the fund manager's legal representation by private counsel, the fund manager's agreement that its private counsel will submit all options and advice to the attorney general fro review, and that the fund manager may not commence any legal action or appeal any decision without the attorney general's prior approval. We hold that the attorney general may not imply such condition
>
> Moreover, the attorney general's interpretation of the statute would

> burden any private attorney or firm retained by the fund manager with a continuing ethical conflict between his duty to hold inviolate the confidences of his client and the need to disclose such information to the attorney general in aid of the attorney general's asserted supervisory function.

The third issue presented is that the GIAA by statute has the authority to retain independent counsel. In 12 GCA §1108(a), (d), the legislature has said:

> The Board may also appoint a Treasurer, a Comptroller and an attorney, all of whom shall serve a the pleasure of the Board...The attorney, who must have been admitted to the practice of law in Guam, shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The attorney for the authority shall represent the Authority in litigation concerning the affairs of the authority.

The Attorney General must approve a contract for legal services. The Attorney General may only participate in the negotiations of the contract "upon the request of the government officer or agency primarily responsible fro such negotiations. 5 GCA §5121(b) The Attorney General is limited to an inquiry as to the "correctness of their form" and "legality" in order to confirm that the required procedures were followed in the awarding of the contract.

2 GAR 2113 states:

> The Attorney General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality. In making such determination of legality, he may require any or all agencies involved in the contract to supply him with evidence that the required procedure precedent to executing the contract werer carried out.

The Legislature in 5 GCA §30109(c) stated: "those branches, department or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General."

These statutes show that the GIAA is statutorily allowed to bring in independent counsel for their representation and the Attorney General must approve the legality of the contracts.

The fourth issue is the infringement of the Attorney General upon the Governor's power to organize the executive branch. The Petitioner in this case refers to the Organic Act and to 48 USCS 1422 as express acts giving the governor the power to organize the executive branch. The Governor is responsible for the faithful execution of the laws of Guam, not the Attorney General. The Petitioner cites to In re Governor, 2002 Guam 1 (Sup.Ct. Guam 2002) which acknowledged that the executive power of Guam was vested exclusively in the "Governor of Guam" pursuant to the Organic Act

The Petitioner states that a writ of mandamus is the proper remedy in this case. This relief is available through 7 GCA §31202, which would compel the Attorney General to

perform "an act that the law specially enjoins, as a duty resulting form an office, trust, or station." Section 31203 provides mandamus relief "in all cases where there is not a plan, speedy. And adequate remedy in the ordinary course of law."

The Respondent argues that the Writ of Mandamus is not a proper remedy. The Bank of Guam v. Reidy, 2001 Guam 14, at 14, 201 WL 686949 (Sup. Ct Guam 2001), sets out four factors which a court must consider in whether to issue an writ of mandamus against a government entity:

> (1) Is the respondent an inferior tribunal, corporation, board or person?
>
> (2) Has the respondent failed to perform a clear, present duty, having the legal authority and present ability to do so?
>
> (3) Does the duty entail ministerial action, the assumption of jurisdiction, the exercise of discretion or the abuse of discretion?
>
> (4) Does the petitioner have a clear, present right and beneficial interest in the performance of the respondent's duty?

The Respondent's first argument is that the office of the Attorney General was created by the Organic Act and thus cannot be limited by the Legislature. The Respondent asks the Court to look at the intention of the framers of this amendment to the Organic Act. The Act was amended for two reasons: 1) to create a position of Attorney General with inherent common law powers and, 2) to give the local legislature the option to make the position of Attorney General elected rather than appointed by the governor. The primary objective of the 1998 amendment was to organically create a position that would be immune form interference

from both executive and the legislative branches. The history starts with the Legislature attempt to move the control of the Attorney General from the executive branch to the legislative branch. This would not meet the objective of making the office independent.

The Legislature adopted Resolution No. 186, 23rd Guam Legislature, on Oct 1, 1997 which called for Organic Act amendments creating the office of the Attorney General. This resolution placed the Attorney General under the legislative branch. This position was challenged by many other senators. Subsequently legislative history show that the reason for the amendment was not for an elected Attorney General but to allow the Legislature to decide whether or not to have an elected Attorney General. The Attorney General has now been established pursuant to the Organic Act, therefore the Guam Legislature cannot eliminate the office. This makes the office immune to local executive or legislative interference.

The Respondent cites that the "Chief Legal Officer" of the state is endowed with common law powers, which extends the Attorney General's powers beyond those created by statutory law. State of Illinois v. Bristol-Myers Co., 470 F.2d 1276 (7th Cir. 1972), citing Hunt v. Chicago House and Dummy Ry. Co., 12 N.E. 176, 181 (Ill. 1887), for the proposition that a language of grant is not restricted to statutory law.

Thus in states where the office of the Attorney General is constitutionally created, such as Guam, the Attorney General's powers are regarded as powers that could not be diminished by local legislation. People ex rel. Castle v. Daniels, 132 N.E.2d 507, 509 (Ill. 1956).

The Respondent goes further to cite to 5 GCA §30103 and §30109. The powers found therein are not exclusive; section 30103 provides, "the Attorney General shall have, in addition to the powers expressly conferred upon him by this chapter, those common law powers which include but are not limited to...unless expressly limited by any law of Guam to the contrary" This statute expressly states that the Attorney General powers were not limited to those enumerated in the statute, Thus the argument that the Attorney General is subject to the powers granted to him by the Legislature is not true.

This is an issue of first impression on Guam and depends on the nature of the office as it was created by Guam and its people. The Petitioner asks this court to rely on Tarantino v. Board of Regents of the University of Guam, Superior Court Civil Case No. CV1455-00, Decision and Order of December 5, 2000. The Respondent argues that this decision was vacated by the Supreme Court of Guam. Because the Chief Justice ordered the case vacated and dismissed; this renders the case as if it did not exist.

The position of the Attorney General is a matter of a constitutional right and however he is selected, is the Chief Legal Officer of Guam and inherits the responsibility of heading the legal affairs of Guam.

The next argument is whether the legislature may permit government agencies to retain independent counsel. The law that this comes from pre- dates the 1998 Amendment to the Organic Act. This creates an issue of statutory construction, which must be resolved by looking at the subsequent law. The federal law designating the Attorney General as the Chief Legal Officer preempts the local law. The Legislature should address this issue within the changes of the Organic Act.

The Respondent then goes on to state that the Board has no power to enter into a "legal services contract" with an "independent contractor." The attorney appointed by the Board is an employee of the board. 4 GCA §4102 provides:

> Classified and Unclassified Services. All offices and employment in the government of Guam, except for the employment as academic personnel of the Guam community College and the University of Guam, as the term academic personnel is defined in enabling laws of GCC and UOG, shall be divided into classified and unclassified services as follows:
>
> (a) The unclassified service shall include the positions of: ...
>
> (10) All offices and employment made, by law, to be at the pleasure of any board, commission or office.

This is in contrast to the interpretation by the Petitioner of 12 GCA §1108. Thus the attorney appointed by the Board is in the classified service. The Attorney General has no legal duty to approve a contract for legal services entered into by the airport with an independent contractor.

The law governing the Government's contractual relations with persons providing personal services to the Government contemplate two different types of contractual relations, and are found in two different titles of the Guam Code.

The first is the personnel laws, which are found in Title 4, and govern those relations wherein, lays an

employer- employee relationship between the Government and the person providing the personal services.

The second is found in the procurement laws under Title 5, and govern those contractual relations in which the person providing the services to the Government is an independent contractor.

12 GCA §1108, by providing for an appointment of an attorney in the unclassified service, provided for the appointment of an employee, not an independent contractor. What is authorized is a "contract of employment" in the unclassified service; not a contract for legal services covered by the Procurement laws. 5 GCA §5121.

The unclassified service includes only persons providing personal services as employees and does not include independent contractors, is indicated by the statutes. 4 GCA §2103.15 makes a distinction between contracts for personal services covered by the procurement laws, and employment in the unclassified services.

4 GCA §2103.16 drew a distinction between a "contract of employment between the government of Guam and any employee or officer in the unclassified service," on the one hand, and the "contracts not involving an employment relationship with the Government of Guam," on the other. The requirements is that contracts for employment be "specifically permitted by law" or be "for a physician or dentist" does not apply to "independent services" by retired employees or "independent contracts" by persons who do not wish to be full time employees. Thus the airport has no authority to enter into a contract with an attorney, as an independent contractor a mandamus does not lie to compel the Attorney General to approve such a contract.

The final argument presented is that the Attorney General's powers do not infringe on the Governor's ability to reorganize the Executive Branch. The Respondent asserts that these are not reorganization decisions. The reorganization to which the Organic Act applies are those contemplated in such laws as 5 GCA 11103, which defines reorganization to include the moving or abolishing of agencies and likewise.

The Court acknowledges the submission of the supplemental briefs and after review of the briefs and hearing of arguments, the Court now issues this decision and order.

Both parties stipulate that this is not a pre-emption case. See Transcript March 28, 2003.

The Court agrees that the powers of the elected attorney general may be limited by legislative action as was stated in Johnson v. Commonwealth, et al., 165 S.W.2d 820, 826 (Ky. 1942) as well to limit the commencing of litigation as in Estate of Sharp, et al. v. State, 217 N.W.2d 258, 262 (Wis. 1974).

The 1998 Amendments to the Organic Act and the legislative history does not allow any enhancements to the powers of the Attorney General. The Organic Act contains no language that either diminishes or expands the power of the Attorney General. The Legislature may still enact legislation to expand or limit the powers of the Attorney General.

5 GCA §30103 states:

Common Law Powers of the Attorney General.

> The Attorney General shall have, in addition to the powers expressly conferred upon him by this chapter, those common law powers which include, but are limited to, the right to bring suit to challenge laws which he believes to be unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, **unless expressly limited by any law of Guam to the contrary.** The Attorney General may permit attorneys admitted to practice in Guam or licensed collection agents to collect accounts or other obligations owing to the Government of Guam, or to nay agency or instrumentality thereof, if such procedure would be in the interest of the Government and expedite the collection of said account or obligation. Any agency or instrumentality not operating under yearly appropriations from the Legislature may retain counsel of its choice for the collection of obligations in the same manner as it may be permitted to retain counsel in other matters as permitted by enabling legislation. Guam Memorial Hospital may permit the Attorney General or attorneys admitted to practice in Guam and agents or licensed collection agents to collect accounts or other obligations owing to Guam Memorial Hospital. (emphasis added)

The Guam Legislature has passed specific statutes, which are enacted prior to the 1998 Amendments to the Organic Act that may seem to have a limitation on the

Attorney General. The Court needs not to interpret these statutes but to decide if these statutes are still valid.

Though the Attorney General has requested that this court produce an interpretation of the definition and powers of the "Chief Legal Officer" for the "Government of Guam", the Court shall rule only to the issue in this case which is whether the Guam Legislature has expressly permitted autonomous agencies to retain independent legal counsel.

The law of Guam is expressly stated in 2 GAR 2113, in which it states:

> Duties of the Attorney General. The Attorney General...shall serve as legal counsel and provide necessary legal services to the Policy officer and the General Services Agency. The Attorney General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality. In making such determination of legality, he may require any or all agencies involved on the contract to supply him with evidence that the required procedures precedent to executing the contract were carried out.

12 GCA §1108(a) states:

> Treasurer, Comptroller, Attorney. (a) The Board may also appoint a ... And an attorney, all of whom serve at the pleasure of the Board. Their duties and compensation shall be fixed by the Board.

5 GCA §5121(b) states:

> Authority to contract for Certain Services and Approval of Contracts; Approval of Contracts for legal Services. No contract for the services of legal counsel in the Executive Branch shall be executed without the approval of the Attorney General. Nothing in this section or chapter shall preclude the Attorney General or his designee from participating in the negotiations for any contract upon the request of the government officer or agency primarily responsible for such negotiations.

The Court finds a Writ of Mandamus is the proper remedy in this case. The Legislature has permitted that the autonomous agencies may retain legal counsel and has required that the Attorney General review all potential professional contracts for correctness of their form and for legality in order to confirm that the required procedures were followed. The Petitioner has the authority to retain its own legal counsel and may request that this Writ be granted because the Respondent has failed to exercise its ministerial duty to review the legal contract thus depriving the Petitioners of its own legal representation.

CONCLUSION

The Court finds that the Petitioner's Writ of Mandate is **GRANTED** and the Attorney General is ordered to approve the legal service contract for the GIAA and the other autonomous agencies as directed by statute, unless the Attorney General can show that the contract has question as to the correctness to form or to the legality of the contract and that the required procedures were followed by the agency. The Attorney General is ordered to approve all such

contracts if valid and to proceed with the legal representation of the line agencies of the executive branch.

Dated this 9th day of May 2003.

s/ Alberto C. Lamorena, III
HONORABLE ALBERTO C. LAMORENA, III
Presiding Judge
Superior Court of Guam

IN THE SUPERIOR COURT OF GUAM

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY by and through its Board of Directors,	)	SPECIAL PROCEEDINGS CASE NO. SP0055-03
Petitioner,	)	**FINAL JUDGMENT GRANTING PEREMPTORY WRIT OF MANDAMUS**
vs.	)	
DOUGLAS B. MOYLAN Attorney General of Guam,	)	
Respondent.	)	

TO THE RESPONDENT DOUGLAS B. MOYLAN, ESQ., ATTORNEY GENERAL OF GUAM:

This matter came on for hearing before this Court on Friday, March 28, 2003. The Court having reviewed the pleadings, declarations, and exhibits, and having heard the arguments of counsel, rendered a Decision and Order on May 12, 2003, granting the Petitioner's Writ of Mandate. The Peremptory Writ of Mandamus was issued on July 1, 2003.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that a Peremptory Writ of Mandamus be issued to Respondent and that he be ordered to approve the legal service contracts for the Petitioner and the other autonomous agencies as directed by statute. Pursuant to Title 2, Guam Administrative Rules and Regulations § 2113, the Respondent's review of the professional services agreements

is limited to an inquiry as to "correctness or their form" and "legality" in order to confirm that the "required procedures" were followed to award the contract. The Respondent is further ordered to proceed with the representation of the line agencies of the Executive Branch of the government of Guam.

Dated: January 29, 2004.

s/ Alberto C. Lamorena, III
HONORABLE ALBERTO C. LAMORENA, III
Presiding Judge, Superior Court of Guam

APPROVED AS TO FORM:

OFFICE OF THE ATTORNEY GENERAL

By:
B. ANN KEITH
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
Territory of Guam
Compiler of Laws Division

April 1, 1997

Honorable Robert Underwood, MC
House of Representatives

FAX: Guam 477-2587
Washington, DC 202-226-0314

Dear Congressman Underwood,

Here are my comments on your proposed amendments to the Organic Act:

1. Unfortunately your proposal with respect to education will not solve the present lawsuit. The issue being litigated now is that other provisions of the Organic Act establish three branches of government, the general (not specific) supervision of the Governor over the Executive Branch and the power of the Legislature to appropriate funds. DOE is arguing that the existing language overrides these basic structures of government, enabling a fourth branch, totally separate and apart from the executive, to exist and to be funded without any input from the Executive. Some recent proposals, one of which was declared unconstitutional at the trial level, would have automatic appropriations if the Legislature did not object within 45 days. Unless the education sections are specific, I see no end to suits and disputes.

Therefore, I suggest that your amendment specify whatever structure you wish to propose, en elected board; an state-level board under the Governor with elected district boards (like in the US) to be created by the Legislature; or whatever. You need to be specific if you are to avoid more litigation. Indeed, your proposal would seem to indicate that public education could be created totally separate and apart fro the government. Is that your intent?

2. Your amendment regarding the Attorney General is very welcome. However, it goes only one-third of the way. Section 1421g(c) (Organic Act) provides for a Public Prosecutor:

> (c) Office of Public Prosecutor: Office of Public Auditor. The Government of Guam may by law establish an Office of Public Prosecutor and an Office of Public Auditor. The Public Prosecutor and Public Auditor may be removed as provided by the laws of Guam.

On reason why the law was never implemented was that it would, *de facto* require a split of the Attorney General's Office. Our experience under the 16th Legislature (before it was declared inorganic) was not all good. Political was not removed from the office and never will be. Another reason for ignoring this law is that it does not provide any specific powers, nor means for appointment, and hence no local consensus.

I have always been of the opinion that the means of appointment is far less important than the tenure of office. We do not elect federal judges, but their independence is assured through other mechanisms. Yet an elected Attorney General would not

necessarily be bad, though by no means would anything get solved by such a change. Now that person would have a personal agenda to pursue, as well as that of the general government. I saw this shift when I was representing both the appointed and later, the first elected Board of Education. Also, the position, if you mention it at all, must be created by the Organic Act, not just permitted. Permission would permit the creation of another office with lesser powers to get around the fact that the Attorney General is the legal officer for the Government of Guam – and there are many who would do just that! The Organic Act should stop games playing as much as possible, not increase it.

The Constitution of Illinois is an excellent example of a very good Attorney General. Modifying the concepts found there for Guam (unicameral legislation, etc.), I suggest the following changes to your proposed bill:

> "(d)(1) There shall be with the Executive Branch of the Government of Guam an Attorney General, who shall be [elected by the voters of Guam] [appointed b the Governor with the advice and consent of the Legislature]. The Attorney General shall server for a term [{if elected} commencing at the same time as the term of the Governor of Guam and ending at the same time] [{if appointed] ending at the same time as the term of office of the appointing Governor, but the Attorney General may be removed

from office in the same manner as may be the Governor of Guam.] [{If appointed} The Governor may remove the Attorney General, but only for cause provided in law, or if he be convicted of a felony or a misdemeanor involving moral turpitude. However, the Attorney General may appeal such removal t the Supreme Court of Guam.]

(2) The Attorney General shall be the legal officer of Guam, and shall be the Public Prosecutor of Guam, and shall have the duties and powers that may be prescribed by law."

The material in brackets [...] are alternatives depending upon the choice as to method of appointment. I am concerned about your draft because, in leaving it solely up to the Legislature, you are not creating a strong office, but rather a weak one having no improvements over the present situation. You should also repeal the current section permitting a Public Prosecutor and regulating that officer's removal.

3. With modern communications, it is high time that we do not require an acting Governor whenever the Governor leaves island.

4. Supreme Court. This is an excellent proposal, and will solve many problems. However, I do have some suggestions. I do not think §(a)(3) will work. While it may good to provide for

some inherent powers, I think you have done it as much as can be done by providing that the Supreme Court is the highest court of Guam. Each state has its own history and doctrine as to what are its inherent powers. It really is not possible to apply the doctrine of 50 states to one jurisdiction. There are too many contradictions. There are too many different state constitutional provisions on the subject.

In the same way as my suggestions in for the other amendments, I suggest that you provide for the appointment and removal of the judges and justices. In the past, there have been amendments to such provisions to ensure that certain individuals are made judges, even where they were not qualified under the prior law. {Some have turned out to be good judges, but that does not mean we should pass laws for particular persons.)

Again, the Illinois Constitution can be instructive, but here the complex structure of the State judiciary makes copying not practical. However, as a replacement for item (3), I suggest the following:

> General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Supreme Court shall appoint an administrative director and staff to assist the Chief Justice in his duties. The administrative director shall

serve at the pleasure of the Court. Subject to the overall direction of the Supreme Court, the Legislature may provide for the staff structure and employment in the lower court(s) of Guam.

Assuming that you do not want to change the appointment and tenure of the justices and judges, I suggest the following changes to subsection (c):

(c) The qualification and duties of the justices and judges of the local courts of Guam, and the practice and procedure of these courts, shall be governed by the laws of Guam.

I have trouble in finding the reference to your amendment to 22C relative to appeals. Are the citations correct (or my sources incorrect)?

Thank you for the opportunity to express my observations on this proposal.

Sincerely yours,

CHARLES H. TROUTMAN

DEPARTMENT OF LAW
Office of the Attorney General

July 16, 1997

Hon. Robert A. Underwood, M.C.
170 Father Duenas Avenue, Suite 107
Agana, GU 96910

Dear Congressman Underwood,

Thank you for sending me the draft amendment to the Organic Act on the Attorney General. I do have a few comments.

First, if the position is to be appointed, I believe that the Organic Act should make it a true "constitutional position" by providing not only a method of removal (other than at the will of the Governor) but also provide for the basic functions of the position, as I mentioned in my earlier letter. The first, regarding removal, is required to overcome the judicial decisions that invalidated the former Public Prosecutor – that the Organic Act as written did not permit the Legislature to protect the office from removal for any reason if the Governor so desired. The Organic Act has been amended with respect to the "public prosecutor" to permit the Legislature to regulate the manner of removal of the officer. To make a meaningful amendment, such must be added here, or we will revert to pre-1984 law.

Second, if there is any substantive meaning to your amendment, the Attorney General needs to have some basic constitutional powers that are not subject to the Legislature's total will. Once before, the Legislature removed from the Attorney General the power to challenge unconstitutional

laws because it did not like one challenge he brought. That limitation was removed when the Public Prosecutor law was invalidated. I don not want to see that kind of skirmishing reinvented.

Therefore, I suggest the following changes to your proposal:

Beginning on line 22, page 2:

> "(A) appointed by the Governor, with the advice and consent of the legislature, for a term ending when a successor is appointed and qualified, and subject to removal only for causes stated in law; or"

Change item (d)(1)(A)(2) to (d)(1)(A)(3) on line 5 of page 3.

> "(2) set forth the duties and compensation of the Attorney General, who, in addition, shall be the chief legal officer of the Government of Guam having cognizance over all legal matters in which the government is in anywise interested."

The broad language comes from the existing law on the jurisdiction of the Attorney General, but haw been modified with reference to other agencies. I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having may and diverse legal "empires" within the government of Guam. This is the same idea as expressed in the 1970 Illinois Constitution.

Thank you for your consideration.

Sincerely yours,

CHARLES H. TROUTMAN
Compiler of Laws

DEPARTMENT OF LAW
Office of the Attorney General

September 2, 1997

Dear Congressman Underwood,

I am sorry for the delay, but I have been somewhat busier this month. I think Bill 354 by Senator Barrett-Anderson has several defects. First, it is inorganic for two reasons. I do not believe that the present Organic Act permits election even for a Public Prosecutor. The amendment permitted the establishment of the office of Public Prosecutor, and permitted the laws of Guam to regulate his/her removal. No mention is made of appointment. Therefore, I conclude that appointment of this Executive Branch officer still remains with the Governor as provided elsewhere in the Organic Act. Second, I believe it is inorganic to expand the idea of a Public Prosecutor to mean the entire legal representation of the Government of Guam. The legislative history will show that the Organic Act was amended in answer to the rejection of the Territorial Prosecutor by the courts. The US Supreme Court has never allowed such expansive readings of the Organic Act. See *People v. Olsen.*

For this reason, the Bill is premature. It is especially so when one considers the fact that the 9th Circuit refused to give retroactive effect to the School Board amendments found in the same Omnibus Bill as are these amendments.

The Bill is incomplete. It should address the reorganization of the Attorney General and the various problems now besetting the Office if the means of selection is to be changed this drastically. There a number of local problems, rightfully the subject of local legislation, that need

addressing. Such include the relationship between the Attorney General and counsel assigned or and/or hired by individual agencies, their funding, etc.

I don't particularly care if the Prosecution Division is separated from the Attorney General, but only if there is enough control remaining in the Attorney General so that he/she still retains general supervision over the legal affairs of the Government of Guam. Most, if not all, state attorneys general retain the power to file appeals or decline them, and to take over prosecutions in cases of conflict of interest or other good reasons. I believe the general attitude to divorce all the legal activities from "the Governor" is just plain bad policy.

Concerning your Bill, I would hope that you can amend it to provide that the Attorney General, no matter how he/she is selected, has the "constitutional" duty of being the chief legal officer for the Government of Guam and has some form of "constitutional" tenure of office. If elected, removal probably would be in lake manner to that of the Governor. If appointed, removal could be only for stated causes.

Thank you for your consideration.

Sincerely,

CHARLES H. TROUTMAN
Compiler of Laws